Supreme Court, U.S.
FILED

06-617 SEP 14 2006

OFFICE OF THE CLERK

No. _____

**IN THE SUPREME COURT OF THE UNITED STATES**

**JAMES RIFFIN**

**Petitioner**

**v.**

**MARYLAND DEPARTMENT OF THE ENVIRONMENT; and BALTIMORE COUNTY, MARYLAND**

**Respondents**

---

# PETITION FOR A WRIT OF CERTIORARI TO THE MARYLAND COURT OF APPEALS

---

James Riffin, *pro se*
Petitioner
1941 Greenspring Drive
Timonium, MD 21093
(443) 414-6210

## 1. QUESTIONS PRESENTED

1. May a state court render a binding judicial decision based upon its interpretation of 49 U.S.C. 10501 (b), (which contains a provision for exclusive federal jurisdiction)?

2. Is there a beginning presumption against preemption when the State attempts to regulate "transportation by rail carrier" (an area where there has been a history of significant federal presence)?

3. Does 49 U.S.C. § 10501 (b) **completely** preempt all state and local regulation of transportation by rail carrier?

4. Are Petitioner's issues of federal preemption moot?

5. Does the Interstate Commerce Commission Termination Act prohibit local or State agencies from requiring that permits be obtained prior to railroad-related construction activities?

6. Does a state court have the authority to determine whether a facility is a railroad facility, or whether an entity is a rail carrier?

7. Must railroad facilities be adjacent to a railroad's main line, or in the same state as a railroad's main line, or owned by a federally licensed rail carrier, in order to be 'instrumentalities of interstate commerce,' under the auspices of the Commerce Clause of the U.S. Constitution, and / or subject to the exclusive jurisdiction of the Surface Transportation Board?

8. Since Maryland's court's of appeal did not address Petitioner's Preemption Argument, due to a finding of mootness, would the Rooker-Feldman doctrine still prevent a federal district court from hearing Petitioner's preemption argument?

9. When State law is preempted, does the question of harm to the State, and the matter of the public interest, drop from a

case involving injunctive relief against that preempted State law?

10. Were material facts in dispute, thereby rendering summary judgment inappropriate?

11. Was the Petitioner denied due process or equal protection of the law, when the State appellate court failed to rule on the common law riparian-rights issues raised by the Petitioner?

## 2. PARTIES

12. James Riffin d/b/a The Frostburg Southern Railroad and The Northern Central Railroad ("Riffin" or "Petitioner"), is a federally licensed Class III freight rail carrier that operates a rail line in Allegany County, Maryland. He is negotiating with the Norfolk Southern Railway Company to purchase the Cockeysville Line , a line of railroad in Baltimore County, Maryland, which is adjacent to the properties which are the subject of this Petition. He also has offered to purchase from Conrail, a line of railroad in Mercer County (Trenton), New Jersey. Petitioner uses the two properties which are the subject of this litigation, as his railroad headquarters, as his main maintenance-of-way facilities, and as storage facilities for his track material and railroad equipment ("Sites").

13. Respondent Maryland Department of the Environment is a Maryland state agency responsible for enforcing Maryland's environmental laws. Respondent Baltimore County, Maryland, is a government entity empowered to administer the laws of Baltimore County, Maryland.

## 3. PETITIONER'S DISCLOSURE OF AFFILIATIONS AND FINANCIAL INTEREST

14. Your Petitioner is not a publicly held entity, nor does he have a parent corporation. He has a 100 % ownership interest. No other publicly held corporation or other publicly held entity has a direct financial interest in the outcome of this litigation. Your Petitioner is not a trade association. This case did not arise out of a bankruptcy proceeding.

## 4. TABLE OF CONTENTS


| | | Page |
|---|---|---|
| 1. | Questions Presented: | i |
| 2. | Parties: | iii |

3. Disclosure of Affiliations and Financial Interest: iii
4. Table of Contents: iii
5. Table of Authorities vi
Cases: vi
Statutes: viii
6. Opinions Below: 1
7. Jurisdiction: 1
8. Statutes Involved: 2
9. When federal questions were raised: 6
10. Statement of the Case: 8
Sequence of events: 8
11. Reasons for Granting the Writ: 12
12. Summary of Argument: 13
13. Argument: 14
14. A State court may not render a binding judicial decision interpreting 49 U.S.C. §10501(b) [which contains a provision for exclusive federal jurisdiction]: 14
15. There is no beginning presumption against preemption when the State regulates in an area where there has been a history of significant federal presence: 15
16. 49 U.S.C.§10501(b) **completely preempts** all State and local regulation of rail carrier facilities: 15
16A. Preemption guidelines: 16
16B. ICCTA preemption: 18
16C. Complete preemption guidelines: 21
16D. State law, as applied in this case, is completely preempted: 26
16E. Cases holding the ICA completely preempts State and local regulations: 27
17. The issues of federal preemption are not moot: 28
18. The ICCTA prohibits a local or State agency from requiring that permits be obtained prior to railroad-related construction activities: 29
19. A railroad facility need not be adjacent to a railroad's main line, or in the same State as a railroad's main line, or owned by a federally licensed rail carrier, in order

to be an 'Instrumentality of interstate commerce,' subject to the exclusive jurisdiction of the STB: 31
20. Rooker - Feldman Doctrine: 31
21. When State law is preempted, the question of harm to the State and the matter of the public interest drop from the case: 31
22. Material facts were in dispute: 32
23. Petitioner was denied due process and equal protection of the law, when the State appellate court failed to rule on the common law riparian-rights issues raised by the Petitioner: 33

**APPENDIX:**

24. Decision, Maryland Court of Appeals: A-1
25. Decision, Maryland Court of Special Appeals: A-3
26. Circuit Court Permanent Injunction (Cockeysville): A-27
27. Circuit Court Injunction (Greenspring site): A-31
28. US District Court Order (Greenspring Tank case): A-32
29. US District Court Memorandum Opinion: A-33
30. US District Court Order (Dismissing Snyder suit): A-38
31. US Dist.Court (Excerpt from hearing transcript): A-39
32. 4th Circuit: Denial of Rehearing: A-42
33. 4th Circuit: Opinion affirming District Court: A-43
34. Verbatim text of statutes involved: A-45
35. STB decision granting Petitioner authority to acquire & operate Allegany County, Md, line of railroad: A-65
36. STB Declaratory Order: ICCTA completely preempts State & local regulation of rail carriers: A-69
37. Decision: Maryland Court of Special Appeals denying Petitioner's Motion for Reconsideration: A-82
38. Petitioner's Motion for Reconsideration to Maryland Court of Special Appeals: A-83
39. **Graphic showing SEQUENCE OF EVENTS: A-100**
40. Synopsis of 8 Supreme Court Cases holding the ICA preempted the State laws at issue: A-101

## 5. TABLE OF AUTHORITIES

### TABLE OF CASES CITED


*Aetna Health Inc. v. Davila*, 542 U.S. 200, 124 S.Ct. 2488 (2004): 23,24

*Alabama Public Service Comm'n v. Southern R. Co.*, 341 U.S. 341, 71 S.Ct. 762, 95 L.Ed. 1002 (1951): A-102

*Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 105 S.Ct. 1904, 85 L.Ed.2d 443 (1978): 16

*ASARCO Inc. v. Kadish*, 490 U.S. 605, 109 S.Ct. 2037, 104 L.Ed. 2d 696 (1989): 15

*Avco Corp. v. Machinists*, 390 U.S. 557, 88 S.Ct. 1235, 20 L.Ed.2d 126 (1968): 22

*Baker Elec. Coop., Inc. v. Chaske*, 28 F.3d 1466, (8th Cir. 1994): 32

*Bank One, Utah v. Guttau*, 190 F.3d 844 (8th Cir. 1999): 32,34

*Boston and Maine Corp. v. Town of Ayer*, 330 F.3d 12 (1st Cir. 2003): 9

*Cedarapids, Inc. v. Chicago, Central & Pacific R.*, 265 F. Supp. 2d 1005 (N.D. Iowa 2003): 10,27

*Chicago v. Atchison, T.& S.F.R.Co.*, 357 U.S. 77, 78 S.Ct. 1063, 2 L.E.2d 1174 (1958): A-102

*Chicago and N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 101 S. Ct. 1124, 67 L.Ed. 2d 258 (1981): 17, A-101

*City of Auburn v. U.S. Government*, 154 F. 3d 1025, (9th Cir. 1998): 20,21,29,30

*Colorado v. United States*, 271 U.S. 153, 46 S.Ct. 452, 70 L.Ed. 878 (1926): A-102

*CSX Transportation, Inc. – Petition for Declaratory Order* STB Docket No. 34662, decided March 14, 2005: 29

*CSX Transp., Inc. v. City of Plymouth*, 92 F. Supp. 2d 643 (E.D. Mich. 2000): 12,15-18

*CSX Transp., Inc. v. Georgia Public Serv. Com'n,*,
944 F. Supp. 1573 (N.D. Ga. 1996): 12,16,18-20,27,30,31
*Dakota, Minn. & Eastern R.R. Corp. v. South Dakota,*
236 F. Supp. 2d 989, (D.S.D. 2002): 27, 32
*Deford v. Soo Line R.R.*, 867 F.2d 1080, (8th Cir.).
*cert.denied,* 492 U.S. 927,109 S.Ct. 3265,
106 L.Ed. 2d 610 (1989): 13,27
*Florida East Coast RY v. City of West Palm Beach,*
266 F. 3d 1324 (11th Cir. 2001): 7,9
*FMC Corp. v. Holliday,* 498 U.S. 52, 111 S.Ct. 403,
112 L.Ed.2d 356 (1990): 23
*Franchise Tax Board of Cal. v. Const. Laborers*
*Vacation Trust*, 463 U.S. 1, 103 S.Ct. 2840,
77 L.Ed. 2d 420 (1983): 22,31
*Friberg v. Kansas City Southern Ry.Co.*,
267 F.3 439 (5th Cir. 2001): 27,29
*Georgia Public Service Comm'n v. CSX Transp., Inc.*,
225 Ga. App. 787, 484 S.E. 2d 799 (1997): 20
*Gully v. First National Bank,* 299 U.S. 109, 57 S.Ct. 96,
81 L.Ed. 70 (1936): 20
*Ingersoll-Rand Co. v. McClendon,* 498 U.S. 133,
111 S.Ct. 478, 112 L.Ed. 2d 474 (1990): 2,16,23,26
*In re Burlington Northern R.R.*, 249 Neb. 821,
545 N.W.2d 749 (1996): 20
*Illinois Commerce Commission v. ICC,* 879 F.2d 917,
(D.C.Cir. 1989): 19
*Malone v. White Motor Corp.*, 435 U.S. 497, 98 S.Ct.
1185, 55 L.Ed.2d 443 (1978): 16
*Medtronic v. Lohr,* 518 U.S. 470, 116 S. Ct. 2240,
135 L.Ed. 2d 700 (1996): 16
*Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 107
S.Ct. 1542, 95 L.Ed. 2d 55 (1987): 22
*Missouri Pacific R.Co. v. Stroud,* 267 U.S. 404,
45 S.Ct. 243, 69 L.Ed. 683 (1925). A-102

*Norfolk Southern Ry. v. City of Austell*
No. 1:97 - c 1018-RLV, 1997 U.S. Dist.
LEXIS 17[illegible] at 17 n.6 (N.D. Ga. 1997): 30
*Palmer v. Massachusetts*, 308 U.S. 79, 60 S.Ct. 34,
84 L.Ed. 93 (1939): A-102
*Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 107 S.Ct.
1549, 95 L.Ed.2d 39 (1987): 23-25
*Purcell v. United States*, 315 U.S. 381, 62 S.Ct. 709,
86 L.Ed. 910 (1942): A-102
*Ridgefield Park v. NY, Susqu. & Western*, 750 A. 2d 57
(N.J. 2000): 30
*Soo Line R. Co. v. City of Minneapolis*, 38 F. Supp. 2d
1096 (D. Minn. 1998): 20,30
*Taylor v. General Motors Corp.*, 875 F.2d 816,
(11th Cir. 1989): 16
*Teper v. Miller*, 82 F.3d 989, (11th Cir. 1996): 16
*Texas & Pacific R. Co. v. Abilene Cotton Oil Co.*, 204
U.S. 426, 27 S.Ct. 350, 51 L.Ed.553 (1907): A-101
*Transit Comm'n v. United States*, 289 U.S. 121,
53 S.Ct. 536, 77 L.Ed. 1075 (1933): A-101
*United States v. Bishop*, 66 F.3d 569 (3d Cir. 1995): 31
*U.S. v. Locke*, 529 U.S. 104; 120 S. Ct. 1135: 12,15-18
*Wisconsin Central Ltd., v. The City of Marshfield*,
160 F. Supp. 2d 1009 (W.D. Wis. 2000): 21,29

## TABLE OF STATUTES CITED

U.S. Const., Article I, § 8, Cl. 3 (Commerce Clause): 1
U.S. Const., Article III (Judicial power): 1
U.S. Const., Art. VI, Cl.2: 16
U.S. Const., 5th Amendment (Due Process of Law): 1,34
U.S. Const., 14th Amendment (Equal Protection of Laws): 1,34
ERISA § 502(a) [29 U.S.C. § 1132(a)]: 5,23,24
ERISA § 514(1) [29 U.S.C. § 1144 (a)]: 6,23,26
Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887): 2,17,23

Interstate Commerce Commission Termination
Act (1996): 2,7,10,12,18-21,23,25,27,30,32
Labor Management Relations Act, §301: 22,24
Staggers Rail Act: 19
28 U.S.C. §1257(a): 1
49 U.S.C. §§10101-11908: 2,7,12,14,28
49 U.S.C. § 10101: 2,4,5
49 U.S.C. §10102:, 3,4,28
49 U.S.C. § 10501 (b): 1,2,6,7,9-15,18-20,23,29,30,34
H.R. Conf. Rep. No. 422, 104th Cong., 1st Sess. 167 (1995),
U.S. Code Cong. & Admin. News 1995, p. 852: 20
§5-503 Maryland Environment Article: 33
§5-512 Maryland Environment Article: 33
§9-303 Maryland Environment Article: 34
§9-322 Maryland Environment Article: 34
§9-323 Maryland Environment Article: 34
§32-4-414 (c) Baltimore County Code: 11, A-60
§32-8-101(a)(1) Baltimore County Code: 11, A-60

## TABLE OF CASES NOT CITED

**(Highly relevant, but not cited due to page limitations)**

*Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504,
101 S.Ct. 1895, 68 L.Ed.2d 402 (1981):
*Baer v. Board of County Com'rs of Washington Co.*,
255 Md. 163, 257 A.2d 201, (1969):
*Battisto v. Perkins*, 210 Md. 542, 124 A.2d 288, (1956):
*Bethlehem Steel Co. v. New York State Labor Relations
Board*, 330 U.S. 767, 67 S.Ct. 1026, 91 L.Ed. 1234 (1947)
*Biberman v. Funkhouser*, 190 Md. 424, 58 A.2d 668, (1948)
*Borough of Riverdale* [Riverdale 1] WL 715272, STB
Fin. Doc. No. 33466, September 10, 1999
*Burlington Northern R.R. v. Oklahoma Tax Comm'n*, 481
U.S. 454, 107 S.Ct. 1855, 95 L.Ed.2d 404 (1987):
*Burlington Northern Santa Fe Corp. v. Anderson*,
959 F. Supp. 1288 (D. Mont. 1997):

*Caterpillar Inc. v. Williams*, 482 U.S 386, 393, 107 S.Ct. 2425, 2430, 96 L.Ed. 2d 318 (1987).
*CFNR Operating Co. v. City of American Canyon*, 282 F. Supp. 2d 1114 (N.D. Cal. 2003):
*Chevron, U.S.A. Inc. v. Natural Resources Defense*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed. 2d 694 (1984):
*Cipolone v. Liggett Group, Inc.*, 505 U.S. 504, 112 S.Ct. 2608, 120 L.Ed. 2d 407 (1992):
*City Dairy Co. v. Scott*, 129 Md. 548, 100 A. 295 (1917)
*County Commissioners of Baltimore County v. Hunter*, 207 Md 171, 113 A.2d 910, (1955):
*CSX Transp., Inc. v. Williams*, 406 F.3d 667 (D.C.Cir.2005)
*English v. General Electric Co.*, 496 U.S. 72, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990):
*Gibbons v. Ogden*, 9 Wheat. 1, 6 L.Ed. 23 (1824).
*Grand Trunk R.R. v. Richardson*, 91 U.S. 454, 23 L. Ed. 356 (1875):
*Grubb v. Public Utilities Comm'n of Ohio*, 281 U.S. 470, 50 S.Ct. 374, 74 L.Ed. 972 (1930):
*Hancock v. Stull*, 206 Md. 117, 110 A.2d 522, (1955):
*Hartford Fire Insurance Co. v. Chicago, M & St. P.R. Co.*, 175 U.S. 91, 20 S.Ct. 33, 44 L.Ed. 84 (1899):
*Howlett v. Rose*, 496 U.S. 356, 370 n. 16 (1990):
*Humphrey v. Sequentia, Inc.*, 58 F.3d 1238 (8th Cir. 1995)
*In re Appeal of Vermont Railway*, 769 A.2d 648 (Vt. 2000)
*Johnson v. De Grandy*, 521 U.S. 997, (1994):
*Kamilewicz v. Bank of Boston Corp.*, No 95 C 6341, 1995 WL 758422, at *6 (N.D. Ill. Dec. 15, 1995), *aff'd* 92 F. 3d 506 (7th Cir. 1996):
*Kennedy-Chamberlin Development Co. v. Snure*, 212 Md. 369, 129 A.2d 142, (1957):
*Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 108 S.Ct. 2182, 100 L.Ed.2d 836 (1988):
*Mark Downs, Inc. v. McCormick Properties, Inc.*, 51 Md. App. 171, 441 A.2d 1119, (1982):
*Martin v. Wilks*, 490 U.S. 755, 784 n. 21 (1989):

*Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 105 S.Ct. 3085, 87 L.Ed.2d 96 (1985):
*Mellon v. Southern Pacific Transport Co.*, 750 F. Supp. 226, (W.D. Tex. 1990):
*Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 105 S.Ct. 2380, 85 L.Ed.2d 728 (1985):
*Missouri Pacific Railroad Co. v. Railroad Commission of Texas*, 833 F. 2d 570, (5th Cir. 1987):
*Neubauer v. Overlea Realty Co.*, 142 Md. 87, 120 A. 69, 73 (1923):
*Norfolk & Western Ry. Co. v. American Train Dispatcher Ass'n*, 499 U.S. 117, 127-134; 111 S. Ct. 1156; 113 L.Ed. 2d 95 (1991):
*Peters v. Union Pac. R.R. Co.*, 80 F.3d 257 (8th Cir. 1996):
*Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 98 S.Ct. 988, 55 L.Ed.2d 179 (1978):
*Remer v. Burlinton Area School District*, 205 F.3d 990, (7th Cir. 2000):
*Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218:
*Rivet v. Regions Bank of La.*, 522 U.S. 470, 118 S.Ct. 921, 139 L.Ed. 2d 921 (1998):
*Robinson v. State*, 353 Md. 683, 728 A.2d 698, (1999):
*Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 414-15 (1923):
*Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 103 S.Ct. 2890, L.Ed.2d 490 (1983):
*United States v. Gonzales*, 520 U.S. 1, 117 S.Ct. 1032, 137 L.Ed. 2d 132 (1997):
*United States v. James*, 478 U.S. 597, 106 S.Ct. 3116, 92 L.Ed.2d 483 (1986):

## TABLE OF STATUTES NOT CITED
**(Relevant, but not cited due to page limitations)**

U.S. Const., Art. VI, cl. 2 (U.S. Constitution is supreme law of land):
28 U.S.C. §1738:

49 C.F.R. §§1050.1; 1150.31-33:
49 C.F.R. §§ 1105.1 - 1105.12.
S.Rep. No. 176, 104th Cong., 1st Sess. 14 (1995):
S.Rep. No. 176, 104th Cong., 1st Sess. 44 (1995):
Maryland Constitution, Article 5:
§4-101.1 Maryland Environment Article:
§4-103 Maryland Environment Article:
§4-105 (a) Maryland Environment Article:
§4-116 (c) Maryland Environment Article:
§4-413 Maryland Environment Article:
§5-101 Maryland Environment Article:
§5-502 Maryland Environment Article:
§5-513 Maryland Environment Article:
§5-514 Maryland Environment Article:
§9-101 Maryland Environment Article:
§9-325 Maryland Environment Article:
§9-339 Maryland Environment Article:
§9-342 Maryland Environment Article:

## TABLE OF RELATED (BUT UNCITED) CASES

Ballard v. Ace Wrecking Co., 289 A.2d 888 (DC, 1972), (D.C. uses common law rule regarding surface waters.)
Board of Ed. of Union Free Sch. Dist. No. 11 v. NYQUIST, 274 N.Y.S. 2d 229 (High water mark)
Carleton v. Cleveland, 112 Me. 310, 92 A. 110 (1914) (Can tell stream bed separate from adjacent riparian land)
Dept. of Nat'l Resources v. Adams, 37 Md. App. 165, 377 A.2d 500 (1977) (Riparian owner = one who owns property bordering on that water. Court may not add to, delete from a statute, nor set aside or evade its operation by forced or unreasonable construction.)
Diedrich v. Farnsworth, 3 Ariz. App. 264, 413 P.2d 774 (1966) (Can divert stream on own property, so long as return it to natural channel before it leaves your property.)

Kelly v. Nagle, 150 Md. 125 132 A.587 (1926) (Owner of spring cannot divert water to non-riparian land with a pipe.)

Kernen v. Homestead Development, 232 Mich.App. 503, 591 N.W.2d 369 (1998) (No cause of action for trespass from proposed sewer plant until it actually happens.)

Lewis v. Texas Utilities Elec. Co. 825 S.W.2d 722 (Tex. App. Dallas 1992) (Private landowner has right to control, retain, and use surface waters.)

Linthicum v. Coan, 64 Md 439, 2 A. 826 (1886) (Accretion belongs to riparian owner if starts at bank. Belongs to state if starts mid-river.)

Mammoth Gold Dredging Co. v. Forbes, 104 P.2d 131 (Calif. 1940) (Present high water mark means: at time executed deed; and means: normal flow.)

McKell v. Spanish Fork City, 6 Utah 2d 92, 305 P.2d 1097 (1957) (Have right to defend against floodwaters.)

McManus v. Otis, 143 P.2d 380 (Calif. 1943) (Have right to protect against flood waters.)

Morgan v. Reading, 3 Smedes & M. 366 (Miss. 1844) (Fantastic history of English, French and Spanish law. W. side Miss. river = French law; E side = common law. Common law: bank of navigable river belongs exclusively to riparian property owner.)

Nunn v. Osborne, 417 P.2d 571 (Okla. 1966) (Lower landowner does not have right to surface waters of upper landowner. Upper landowner can retain surface waters.)

San Pedro, L.A. & S.L. R. Co. v. Simons Brick Co., 187 P. 62 (Calif. 1920) (Stream does not include flood waters.

St. Louis I. M. & S. Ry. Co. v. Walker, 89 Ark. 556, 117 S.W. 534 (1909) (Railroad has duty to provide opening in embankment sufficient to allow natural, not flood, waters.)

Schulze v. Monsanto Co., 782 S.W.2d 419 (Mo. App. 1989) (May build levee, so long as not reckless. OK to put rip rap in stream to prevent bank erosion.)

Spencer v. O'Brien, 158 S.W.2d 445 (Tenn. 1942) (Have right to build levee. Changes unproductive land to productive land. Helps self and public in general.)

State v. Barnes, 171 Kan. 491, 233 P.2d 724 (1951) (State cannot litigate on behalf of individual citizens.)

U.S. v. Pend Oreille Public Utility Dist. No. 1, 926 F.2d 1502 (9th Cir.1991) (Under federal law stream / river = where vegetation does not grow. If vegetation grows, then land is not a part of the stream / river. Court does not defer to Admin. Ag. determination of law.)

U.S. v. State of Oregon, 295 U.S. 1, 55 S.Ct. 610 (1935) (Title to navigable waters and beds thereof, passed to state when admitted as a state. Navigability = federal question.)

Waring v. Stinchcomb, 141 Md. 569, 119 A. 336 (1922) (Accretion belongs to land in front of which it is deposited.)

West Arlington Imp. Co. v. Mount Hope Retreat, 97 Md. 191, 54 A. 982 (1903) (Riparian owner can dam non-navigable stream so long as lower riparian proprietors do not object.)

## 6. OPINIONS BELOW

15. The unpublished opinions of the Maryland Court of Appeals, Maryland Court of Special Appeals, the Circuit Court for Baltimore County, Maryland, and unpublished Opinions of the U.S. District Court for Maryland, Baltimore Division, and the 4th Circuit Court of Appeals, are reproduced in the Appendix.

## 7. JURISDICTION

16. Jurisdiction is proper in this Court. This case involves the preemptive reach of 49 U.S.C. 10501 (b), the preemptive reach of the Commerce Clause of the U.S. Constitution, and whether Maryland's state courts complied with the due process and equal protection clauses of the U.S. Constitution.

17. On June 16, 2006, the Maryland Court of Appeals, Maryland's highest court, denied Petitioner's *Writ of Certiorari.* 28 U.S.C. § 1257 (a) states: "Final judgments ... rendered by the highest court of a State ... may be reviewed by the Supreme Court by writ of certiorari ... where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, ... laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or ... statutes of, ... the United States."

18. Article III, Section 2, of the United States Constitution, ("Constitution") states the judicial power of the United States "shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States ... ." The 14th Amendment to the U.S. Constitution states: "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Under Art. I, §8, Cl. 2 of the Constitution, Petitioner's Sites, as 'Instrumentalities of Interstate Commerce," are subject to Federal, not State regulation.

19. The judgment to be reviewed, was rendered on June 16, 2006. A petition filed by September 14, 2006, would be timely.

## 8. STATUTES INVOLVED[1]

20. **49 U.S.C. § 10501 (b):**

"**(b)** The jurisdiction of the Board over –

**(1)** transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and

**(2)** the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,

is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

---

1 The Interstate Commerce Act ("ICA"), enacted in 1887, is codified in 49 U.S.C. §§10101 - 11908. The ICA has been amended several times, the two most recent amendments being the Staggers Rail Act (1980) and the Interstate Commerce Commission Termination Act ("ICCTA") (1996) [which amended, then reenacted, the ICA. One significant change brought about by the ICCTA, was the abolishment of the Interstate Commerce Commission, which was replaced by the Surface Transportation Board ("Board" or "STB")]. Two other significant changes brought about by the ICCTA, was a broadening of the exclusive jurisdiction of the Board, which, under the ICCTA, includes wholly intrastate tracks, thereby eliminating concurrent State and Federal jurisdiction over wholly intrastate tracks (which the Staggers Rail Act had provided for). In addition, the ICCTA eliminated §10101(a)(1)(E), which stated: "(E) to cooperate with each State and the officials of each State on transportation matters;"

21. **49 U.S.C. §10102. Definitions**

In this part –

**(1)** "Board" means the Surface Transportation Board;

**(2)** "car service" includes (A) the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, other vehicles, and special types of equipment used in the transportation of property by a rail carrier, and (B) the supply of trains by a rail carrier;

**(3)** "control", when referring to a relationship between persons, includes actual control, legal control, and the power to exercise control, through or by (A) common directors, officers, stockholders, a voting trust, or a holding or investment company, or (B) any other means;

**(4)** "person", in addition to its meaning under section 1 of title 1, includes a trustee, receiver, assignee, pr personal representative of a person;

**(5)** "rail carrier" means a person providing common carrier railroad transportation for compensation, but does not include street, suburban, or interurban electric railways not operated as part of the general system of rail transportation;

**(6)** "railroad" includes –

**(A)** a bridge, car float, lighter, ferry, and intermodal equipment used by or in connection with a railroad;

**(B)** the road used by a rail carrier and owned by it or operated under an agreement; and

**(C)** a switch, spur, track, terminal, terminal facility, and a freight depot, yard, and ground, used or necessary for transportation;

**(7)** "rate" means a rate or charge for transportation;

**(8)** "State" means a State of the United States and the District of Columbia;

**(9)** "transportation" includes –

**(A)** a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of

ownership or an agreement concerning use; and

**(B)** services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property;"

**(10)** "United States" means the States of the United States and the District of Columbia."

22. **49 U.S.C. § 10101 Rail transportation policy.**

"In regulating the railroad industry, it is the policy of the United States Government –

**(1)** to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;

**(2)** to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required;

**(3)** to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Board;

**(4)** to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense;

**(5)** to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes;

**(6)** to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital;

**(7)** to reduce regulatory barriers to entry into and exit from the industry;

**(8)** to operate transportation facilities and equipment without

detriment to the public health and safety;

**(9)** to encourage honest and efficient management of railroads;

**(10)** to require rail carriers, to the maximum extent practicable, to rely on individual rate increases, and to limit the use of increases of general applicability;

**(11)** to encourage fair wages and safe and suitable working conditions in the railroad industry;

**(12)** to prohibit predatory pricing and practices, to avoid undue concentrations of market power, and to prohibit unlawful discrimination;

**(13)** to ensure the availability of accurate cost information in regulatory proceedings, while minimizing the burden on rail carriers of developing and maintaining the capability of providing such information;

**(14)** to encourage and promote energy conservation; and

**(15)** to provide for the expeditious handling and resolution of all proceedings required or permitted to be brought under this part."

23. **§ 502 (a) ERISA [held to completely preempt state law]:** "A civil action may be brought – (1) by a participant or beneficiary – (A) for the relief provided for in subsection (c) of this section, or (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(7) by a State to enforce compliance with a qualified medical child support order *** ;

(e) **Jurisdiction** (1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, fiduciary, or any person referred to in section 1021(f)(1) of this title. State courts of competent jurisdiction and

district courts of the United States shall have concurrent jurisdiction of actions under paragraphs (1)(B) and (7) of subsection (a) of this section."

24. **§514(a) ERISA [held to completely preempt state law]:** "Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title."

25. Other statutes involved are reproduced in the appendix.

## 9. WHEN FEDERAL QUESTIONS WERE RAISED

26. The federal questions sought to be reviewed, were presented at the beginning of the proceedings in the State trial court, when the Petitioner filed Motions to Dismiss for Lack of Jurisdiction,[2] and were presented at the beginning of all State appellate court proceedings.[3] In all of the State court proceedings, Petitioner argued the State court had no jurisdiction to render a binding judicial decision based on its interpretation of a federal statute containing a provision for exclusive federal jurisdiction. Petitioner further argued that 49 U.S.C. § 10501 (b) vested exclusive regulatory authority over transportation by rail

---

2 For the Cockeysville site (Case No. 03-C-04-008920; Appeal No. 1593) see: Petitioner's 8/30/04 Motion to Dismiss for Lack of Jurisdiction; P.3 of transcript wherein Petitioner stated: "The first motion that we should address is does this Court have the jurisdiction to even hear the case." For the Greenspring Drive site (Case No. 03-C-03-013144; Appeal No. 1802), the trial court proceeding was not recorded. On page 4 of the Opinion of the Court of Special Appeals, that court noted Petitioner had filed a Motion to Dismiss for Lack of Jurisdiction.

3 See pp. iv, 22-55, of Appellant's Court of Special Appeals' Brief.

carrier, with the Surface Transportation Board ("Board" or "STB"), that the Interstate Commerce Commission Termination Act of 1996 ("ICCTA") **completely** preempts all State and local regulation of transportation by rail carrier, and that the remedies in 49 U.S.C. §§ 10101 - 11908 are exclusive and preempt all other Federal and State remedies. Petitioner further argued that whether the Board had exclusive jurisdiction over a site was to be determined by what occurred at the site, **not** by who **owned** the site. See *Florida East Coast RY v. City of West Palm Beach*, 266 F. 3d 1324 (11th Cir. 2001), holding that mere ownership of a site by a rail carrier did not vest the Board with exclusive regulatory authority over the site.

27. The trial court effectively ruled it did have authority to render a judicial decision based on its interpretation of 49 U.S.C. §10501(b), when it ruled this federal statute did not preempt Maryland's environmental laws. Maryland's appellate courts held that the issue of federal preemption was rendered moot, due to the Petitioner's loss of federally-licensed rail carrier status for a 15-day period of time, during which 15-day period of time, the Greenspring Drive (Appellate Case No. 1802) motion-hearing was held, and an injunction was issued. The Appellate Court further ruled that the issue of federal preemption in the Cockeysville Case (Appellate Case No. 1593), was rendered moot when the Board revoked Petitioner's third (Pennsylvania) Notice of Exemption ("NOE") on February 23, 2005, which was prior to the date the Court of Special Appeals rendered its decision on February 3, 2006.[4] In a Motion for Reconsideration filed by the Petitioner on March 3, 2006, Petitioner provided the Court of Special Appeals with a copy of a December 13, 2005 ruling by the Board, granting Petitioner authority to acquire and operate his Frostburg Southern line of railroad, which ruling reinstated, **prior** to the decision of the Court of Special Appeals, Petitioner's status as a federally licensed rail carrier.

---

4 See pp. 1, 4, 13-15, of the opinion of the Court of Special Appeals.

28. At all stages, Petitioner has consistently argued the Board's exclusive regulatory jurisdiction over railroad facilities is **not** contingent upon the facility being **owned** by a federally licensed rail carrier. The deciding factor is whether **use** of the site **relates to** the movement of passengers or property by rail. Both of the sites which are the subject of this litigation, are utilized to store "equipment related to the movement of passengers or property by rail," [railroad maintenance-of-way equipment, such as tampers, ballast equilizers, etc., hundreds of concrete railroad ties, and hundreds of tons of railroad ballast material], and both provide "services related to that movement," [such as invoicing, printing of bills-of-lading and other material, signage, etc.]. Since the statute clearly states "regardless of ownership," whether these facilities are owned by a federally licensed rail carrier is irrelevant. What **is** relevant, is whether the equipment located at the site "relates to the movement of passengers or property by rail," and whether services provided at the facility "relate to the movement of passengers or property by rail." Maryland's courts have misread the "explicit statutory language and the structure and purpose of the statute." *Ingersoll-Rand Co. v. McClendon,* 498 U.S. 133, 137-138, 111 S.Ct. 478, 482, 112 L.Ed. 2d 474 (1990).

## 10. STATEMENT OF THE CASE

A graphic showing the SEQUENCE OF EVENTS, appears on the last two pages of the Appendix.

**Cockeysville railroad maintenance-of-way facility: Case No. 03-C-04-008920; Appeal No. 1593.**

29. **Circuit court.** Petitioner, a federally licensed Class III rail carrier, began constructing a railroad facility in a riverine floodplain, located in Cockeysville, Baltimore County, Maryland. Petitioner did not apply for any State or local permits before beginning construction of the facility. [Railroad case-law specifically has held local permitting laws have been preempted

and have held that if a railroad applies for a permit, the railroad may be held to have voluntarily consented to be regulated by that permitting agency. See *Boston and Maine Corp. v. Town of Ayer*, 330 F.3d 12, 16 (1st Cir. 2003) {"A town may seek enforcement of voluntary agreements a railroad has entered into with a town."} Petitioner graded and filled approximately 9,000 sf of the floodplain. The State of Maryland and Baltimore County filed suit against Petitioner, asking the Baltimore County Circuit Court to enjoin Petitioner from any further construction activity at the railroad facility. Petitioner removed the case to the U.S. District Court for Maryland. Petitioner argued, since the Surface Transportation Board had exclusive jurisdiction over railroad facilities, the proper forum for hearing Maryland's Complaints regarding Petitioner's railroad facilities, was before the Board, not in a state court. On September 8, 2004, the U.S. District Court Ordered this case and two other related cases (Greenspring facility and fuel tank cases), be remanded back to State court. The U.S. District Court wrote a Memorandum Opinion for the fuel tank case. It did not write a Memorandum Opinion for the Cockeysville or Greenspring facilities cases. On September 9, 2004, the circuit court issued a preliminary injunction ordering Petitioner to cease all construction activity, and to remove hundreds of tons of stockpiled railroad ballast from the facility. A timely appeal was filed.

30. **U.S. District Court.** The U.S. District Court started with a presumption against preemption, then found 49 U.S.C. § 10501 (b) did not *completely* preempt all local and State regulation of railroad facilities, T.(USDC) 57, citing as authority, *Florida East Coast RY v. City of West Palm Beach*, 266 F. 3d 1324 (11th Cir. 2001) [which held *non*-rail carrier activities are not preempted]. It did not address Petitioner's argument that State courts do not have the authority to render a binding judicial decision based on the State court's interpretation of a federal statute, when that statute contains a provision for exclusive federal jurisdiction. It did not adopt the decision rendered in

*Cedarapids, Inc. v. Chicago, Central & Pacific R.*, 265 F. Supp. 2d 1005 at 1010 (N.D. Iowa 2003), where that court held that the Interstate Commerce Commission Termination Act ("ICCTA") *completely* preempts state regulation of railroads. Petitioner then filed a Complaint for Injunctive Relief in the U.S. District Court for Maryland, asking the court to enjoin the attorneys who had sued Petitioner, from attempting to subject Petitioner's railroad facility to Maryland's regulations. The U.S. District Court dismissed Petitioner's Complaint for lack of subject-matter jurisdiction, citing its previous finding that 49 U.S.C. § 10501 (b) did not *completely* preempt local or State regulation of railroad facilities, the *Rooker-Feldman* doctrine and the doctrine of collateral estoppel. Petitioner appealed the dismissal of his Complaint for Injunctive Relief to the 4th Circuit Court of Appeals. On February 14, 2005, the 4th Circuit affirmed the District Court's decision "for the reasons stated by the district court."

31. **Circuit court.** At a November 18, 2004, hearing on Respondents' Motion for Summary Judgment, Judge Watts, without making any findings of fact, T. (perm inj) 55. E. 138, signed an injunctive order, enjoining Petitioner from continuing with the construction of his Cockeysville railroad maintenance-of-way facility. Petitioner timely filed a Notice of Appeal.

**Greenspring railroad headquarters & maintenance-of-way facility: Case No. 03-C-03-013144; Appeal No. 1802.**

32. Petitioner uses his Greenspring site as a maintenance-of-way storage facility, as his railroad headquarters, and for 'back-office' support purposes. Ten years prior to Petitioner purchasing the Greenspring facility, a printed circuit board company contaminated the soil at the site by pouring chlorinated solvents on the ground. The EPA investigated the site, then closed the file, recommending no remediation. Respondent MDE received a grant to reinvestigate previously closed cases. The Greenspring site was selected for further review. Petitioner

objected to MDE's efforts to investigate the site, citing 49 U.S.C. §10501(b), which grants the Surface Transportation Board exclusive regulatory jurisdiction over railroad facilities. MDE filed a Complaint for Injunctive Relief in the Circuit Court for Baltimore County asking the court to order Petitioner to grant MDE access to the site. At a motion hearing, the court granted MDE the injunctive relief it sought. Petitioner removed the case to the U.S. District Court. That court remanded the case back to the circuit court on September 8, 2004, citing the same reasoning it had used before remanding Case No. 03-C-04-008920 (Cockeysville case) back to the circuit court. MDE seeks to force Petitioner to pay the full cost of remediating the site (estimated cost = $500,000 or more).

33. **Undue interference with Petitioner's railroad operations:** Respondents permitting requirements unduly interfere with Petitioner's railroad operations, for these permitting requirements, and the attendant litigation associated with these permitting requirements, have stopped construction of Petitioner's Cockeysville railroad maintenance-of-way facility, and have seriously impeded Petitioner's ability to maintain his maintenance-of-way equipment and his line of railroad. Furthermore, Respondents permitting requirements **prohibit any type of development in a riverine floodplain, and prohibit placing any type of equipment, or material, such as railroad ballast, in a riverine floodplain,** and thus preclude using Petitioner's Cockeysville site as a maintenance-of-way facility. *See Baltimore County Code* §32-8-101(g)(1), and §32-4-414(c), p. 60 Appendix. (The entire site is in a riverine floodplain.) The economic costs associated with obtaining another site adjacent to a railroad right-of-way in the Baltimore area would drain capital from Petitioner's railroad operations, and would thus impair Petitioner's ability to fully capitalize his railroad operations, thus unduly interfering with Petitioner's railroad operations. (There are no other sites along the Cockeysville line of railroad where a maintenance-of-way facility could be built.)

The effect of the state's environmental laws is to force Petitioner to purchase an alternative site for Petitioner's maintenance-of-way facility. This conflicts with the court's holding in *CSX Transp., Inc. v. City of Plymouth*, 92 F. Supp. 2d 643, 658 (E.D. Mich. 2000), wherein that court stated: "To the extent the state law is viewed as having the effect of requiring the railroad to undergo substantial capital improvements, the Court finds that the law is preempted by the Interstate Commerce Commission Termination Act."

## 11. REASONS FOR GRANTING THE WRIT

34. This case falls within the considerations in Supreme Court Rule 10 governing review on *certiorari*, specifically:

(A) The 4th Circuit Court of Appeals and Maryland's Appellate Courts have rendered decisions in conflict with the decisions of other U.S. District Courts and Courts of Appeal. [Preemptive reach of 49 U.S.C.§10501(b): 8th circuit, 5th circuit, N.D. Iowa, N.D. Georgia, D.S.Dakota.: **complete preemption**; 4th circuit and Maryland: **not complete preemption**. See ¶ 56, *infra.*] [There is a beginning assumption of non-preemption when the State attempts to regulate "transportation by rail carrier" (an area where there has been a history of significant federal presence). These decisions conflict with *U.S. v. Locke*, 529 U.S.104, 108; *CSX Transp., Inc. v. City of Plymouth*, 92 F. Supp 2d 643, 648 (E.D. Mich. 2000); and *CSX Transp., Inc. v. Williams*, 406 F.3d 667, 673 (D.C.Cir. 2005).

(B) Maryland's courts have decided important federal questions in a way that conflicts with other U.S. District Courts and Courts of Appeal: [Preemptive reach of 49 U.S.C. §10501(b): **9th circuit: preempts State environmental laws; Maryland: does not preempt Maryland's environmental laws.**] [Maryland courts: The remedies in 49 U.S.C. §§ 10101 - 11908 are not exclusive. Conflicts with *CSX Transp., Inc. v. Georgia Public Serv. Com'n*, 944 F.Supp. 1573, 1581 (N.D. Ga.

1996) and *Deford v. Soo Line Railroad Company*, 867 F.2d 1080, 1091 (8th Cir.1989) ["The ICA provides both a forum and a set of remedies that is exclusive and completely preempts competing state law claims."].

(C) The 4th circuit and Maryland's court of last resort have decided an important question of federal law that has not been, but should be, settled by this Court: Maryland: 49 U.S.C. §10501(b) does not vest the STB with exclusive regulatory authority over rail facilities containing railroad-related equipment, when that railroad facility is not owned by a federally licensed rail carrier.

(D) Maryland has decided an important federal question in a way that conflicts with relevant decisions of this Court. [May a State court render a binding judicial decision based on its interpretation of a federal statute containing a provision for exclusive federal jurisdiction?: U.S. Supreme Court: No; Maryland: Yes.]

## 12. SUMMARY OF ARGUMENT

35. This case involves the interpretation of 49 U.S.C. § 10501 (b), a federal statute which states the Surface Transportation Board shall have exclusive jurisdiction over the regulation of transportation by rail carriers. The Supreme Court has held that state courts do not have the authority to render binding judicial decisions based on a state court's interpretation of a federal statute which contains a provision for exclusive federal jurisdiction. Consequently, the judicial decisions rendered by those Maryland state courts that have interpreted the preemptive reach of 49 U.S.C. § 10501 (b), are nullities.

36. The Supreme Court has held that in an area where there has been a history of significant federal presence (such as the regulation of rail carriers), there is no beginning presumption

against preemption. A number of courts (see ¶56, below) have held 49 U.S.C. § 10501 (b) **completely** preempts regulation of transportation by rail carriers, and have further held that with respect to the regulation of transportation by rail, the remedies found in 49 U.S.C. §§ 10101 -11908, are exclusive, and preempt all other Federal or State remedies.

37. Since the STB has exclusive jurisdiction over transportation by rail carriers, only the STB may render a decision determining when an entity becomes a rail carrier, or determining whether a facility is a railroad facility. Likewise, since the STB has exclusive jurisdiction over the construction, operation and maintenance of railroad facilities, a rail carrier need not obtain a permit from a state or local official prior to constructing a railroad facility.

38. Railroad facilities need not be adjacent to a railroad's main line, in the same state as a railroad's main line, or owned by a federally licensed rail carrier, in order to be 'instrumentalities of interstate commerce,' subject to the exclusive jurisdiction of the STB. Petitioner would further argue that under the Commerce Clause of the Constitution, Petitioner's Sites, as 'Instrumentalities of Interstate Commerce," are subject to Federal, not State regulation.

39. When State and local laws are preempted, the question of harm to the state and the matter of the public interest drop from the case.

## 13. ARGUMENT

## 14. A STATE COURT MAY NOT RENDER A BINDING JUDICIAL DECISION INTERPRETING 49 U.S.C. §10501(b) [WHICH CONTAINS A PROVISION FOR EXCLUSIVE FEDERAL JURISDICTION]

40. In *ASARCO Inc. v. Kadish,* 490 U.S. 605, 617, 109 S.Ct.

2037, 2045, 104 L.Ed. 2d 696 (1989) the Supreme Court made the following statement: "Although the state courts are not bound to adhere to federal standing requirements, they possess the authority, **absent a provision for exclusive federal jurisdiction**, to render binding judicial decisions that rest on their own interpretations of federal law.... (Emphasis added.)

41. Since 49 U.S.C. § 10501 (b) contains a provision for exclusive federal jurisdiction over the regulation of railroad facilities, and since the Supreme Court has held state courts may render binding judicial decisions based on the state court's interpretation of a federal statute *only if* the federal statute does *not* contain a provision for exclusive federal jurisdiction, state courts **do not** have the authority to render a binding judicial decision based on that state court's interpretation of 49 U.S.C. § 10501 (b). Consequently, all the decisions rendered by Maryland's state courts with regard to Petitioner's railroad facilities, are invalid and are nullities.

## 15. THERE IS NO BEGINNING PRESUMPTION AGAINST PREEMPTION WHEN THE STATE REGULATES IN AN AREA WHERE THERE HAS BEEN A HISTORY OF SIGNIFICANT FEDERAL PRESENCE

42. In *U.S. v. Locke,* 529 U.S. 104, 108; 120 S. Ct. 1135, 1147, the court stated: "an "assumption" of nonpreemption is not triggered when the State regulates in an area where there has been a history of significant federal presence." ... *See also: CSX Transp., Inc. v. City of Plymouth*, 92 F. Supp. 2d 643, 649, discussed in ¶45 below. ... In accord: *CSX Transp., Inc. v. Williams,* 406 F.3d 667, 673 (D.C.Cir. 2005).

## 16. 49 U.S.C. § 10501 (b) COMPLETELY PREEMPTS ALL STATE AND LOCAL REGULATION OF RAIL CARRIER FACILITIES.

## 16 A. PREEMPTION GUIDELINES

43. " "The question whether a certain state action is preempted by federal law is one of congressional intent. 'The purpose of congress is the ultimate touchstone.' " *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208, 105 S.Ct. 1904, 1909-10, 85 L.Ed.2d 443 (1978); *** (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 504, 98 S.Ct. 1185, 1189-90, 55 L.Ed.2d 443 (1978)). To discern Congress' intent we examine the explicit statutory language and the structure and purpose of the statute." *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 137-138, 111 S.Ct. 478, 482, 112 L.Ed. 2d 474 (1990).

44. In *CSX Transp., Inc. v. Georgia Public Serv. Com'n, op.cit.* at 1580 - 1581, that court stated:

> "Preemption doctrine is rooted in the Supremacy Clause of the United States Constitution, *Teper v. Miller*, 82 F.3d 989, 993 (11th Cir. 1996). *See* U.S. Const. Art. VI, cl. 2. Because it requires that conflicts between state and federal law be resolved in favor of federal law, the Supremacy Clause prohibits the enforcement of any state law that conflicts with a valid federal statute. *Taylor v. General Motors Corp.*, 875 F.2d 816, 821 (11th Cir. 1989).
>
> ... The intent of Congress to expressly preempt state law is "primarily discerned from the language of the preemption statute and the statutory framework surrounding it." *Medtronic, supra.* The policy behind the federal statute, as well as its legislative history, may also be relevant in determining whether Congress intended the statute to preempt state law. *Teper v. Miller.*

45. In *CSX Transp., Inc. v. City of Plymouth, op. cit.*, the court cited the following from *U.S. v. Locke, op. cit.* at U.S. 108, S. Ct. at 1147-1148, (a case involving maritime preemption):

"In *Locke*, the Court made clear that "an 'assumption' of nonpreemption is not triggered when the State regulates in an area where there has been a history of significant federal presence." ... "The *Locke* Court noted that "Congress has legislated in the [area of maritime commerce] from the earliest days of the Republic, creating an extensive federal statutory and regulatory scheme." *City of Plymouth* at 648.

"Important for our purposes here, the Court expressly stated:

"The state laws now in question bear upon national and international maritime commerce, and in this area there is no beginning assumption that concurrent regulation by the State is a valid exercise of its police powers. Rather, we must ask whether the local laws in question are consistent with the federal statutory structure, which has as one of its objectives a uniformity of regulation for maritime commerce." *Locke* at 1148. *City of Plymouth* at 648.

The City of Plymouth court then stated:

"There can be no doubt that just as Congress has regulated ships and vessels since the beginning of the Republic, it has similarly done so with respect to our Nation's rail system. Both Congress and the courts have traditionally recognized a need to regulate railroad operations at a national level. Enacted in 1887, the Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887), has been described as **"among the most pervasive and comprehensive of federal regulatory schemes."** ... As amended, the Act still governs federal railroad regulation. Congress' power to regulate the railroad industry has been well-recognized. ... **The preclusive effect of federal regulation has been repeatedly acknowledged.** *Chicago and N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318, 101 S. Ct. 1124, 67 L.Ed. 2d 258 (1981). *City of Plymouth* at 648. (Emphasis

added.)

After citing numerous Acts of Congress that affect railroads, the City of Plymouth court then concluded:

> "These decisions and Acts of Congress, as well as the numerous federal regulations which pertain to this area, have created "an extensive federal statutory and regulatory scheme." *Locke* at 1148. Accordingly, in this area, as in *Locke*, where the state statute at issue bears upon an area traditionally regulated by the federal government, **"there is no beginning assumption that concurrent regulation by the State is a valid exercise of its police powers."** *Id. City of Plymouth* at 649. (Emphasis added.)

> "To the extent the state law is viewed as having the effect of requiring the railroad to undergo substantial capital improvements, the Court finds that the law is preempted by the Interstate Commerce Commission Termination Act." *City of Plymouth* at 658.

## 16 B. ICCTA PREEMPTION

46. The ICCTA contains an express preemption clause. As was stated in *CSX Transp., Inc. v. Georgia Public Serv. Com'n, op. cit* (p. 1581): "It is difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority over railroad operations." In the *CSX* case, the Defendants tried to argue the ICCTA's preemption clause preempted state remedies only when federal remedies are provided under the ICCTA. The court responded to this argument as follows:

> "Defendants' argument reflects a misunderstanding not only of the plain language of section 10501 (b)(2), but also of the ICC Termination Act generally. The most natural reading of section 10501(b)(2) is that the federal remedies provided by the ICC Termination Act are the only remedies available as

to the regulation of rail transportation, and that the federal remedies are exclusive of state remedies except where the ICC Act has expressly provided otherwise.

47. The court in *CSX Transp., Inc. v. Georgia Public Serv. Com'n, op. cit.*, ("CSX") stated:

"As discussed, it is clear to the Court that Congress intended the preemptive net of the ICC Termination Act to be broad by extending exclusive jurisdiction to the STB over anything included within the general and all inclusive term "transportation by rail carriers." 49 U.S.C. 10501 (b)(a). The Court will not ignore Congress's use of broad terms which include railroad agencies, such as "transportation by rail carriers" and "services" related to rail transportation, merely because Congress specifically denoted its intent to preempt state regulatory authority of wholly intrastate spur and side tracks in the same code section. Intrastate spur and side tracks were explicitly excluded from federal jurisdiction in the ICC Termination Act's predecessor, the Staggers Rail Act. *See Illinois Commerce Commission v. ICC , supra,* at 921. (Recognizing that intrastate spur abandonments were explicitly placed within exclusive jurisdiction of states and outside jurisdiction of ICC under Staggers Rail Act). Thus Congress's specificity as to intrastate tracks does not detract from its use of widely inclusive terms such as "transportation by rail carriers" in the ICC Termination Act's preemption clause and statement of the STB's exclusive jurisdiction. There is no basis on which to argue that Congress intended to carve out regulatory control over agencies as an exception to its otherwise broad preemption of state regulation of railroad operations."

"Perhaps the most significant change to the Staggers Rail Act, which the Court has already discussed, is the ICC Termination Act's express removal from the states of

jurisdiction over wholly intrastate railroad tracks. With the extension of exclusive federal jurisdiction over wholly intrastate tracks, one of the few railroad matters previously within the jurisdiction of the state, the ICC Termination Act evinces an intent by Congress to assume **complete jurisdiction**, to the exclusion of the states, over the regulation of railroad operations. *See* H.R. Conf. Rep. No. 422, 104th Cong., 1st Sess. 167 (1995), U.S. Code Cong. & Admin. News 1995, p. 852 (explaining that **only state regulation of non-rail matters, for example in state criminal statutes, is not preempted by** ICC Termination Act because state regulation of nonrail matters does not "generally collide with the scheme of economic regulation (and deregulation) of rail transportation")." *CSX, Id.* at 1584. (Emphasis added.)

48. In *Soo Line R. Co. v. City of Minneapolis*, 38 F. Supp. 2d 1096, (D. Minn. 1998), that court stated:

"Thus, when section 10501(b) grants the STB exclusive jurisdiction over "transportation by rail carriers," **it logically includes the yard, property, facilities and any intermodal equipment used in connection with a railroad, or related to the movement of passengers or property.**" *Id.* at 1099. (Emphasis added.)

49. In *City of Auburn v. U.S. Government*, 154 F.3d 1025 (9th Cir. 1998), the court held "there is nothing in the case law that supports Auburn's argument that, through the ICCTA, Congress only intended preemption of economic regulation of the railroads. All the cases cited by the parties find a broad reading of Congress' preemption intent, not a narrow one. *See also Georgia Public Service Comm'n v. CSX Transp., Inc.*, 225 Ga. App. 787, 484 S.E. 2d 799, 801 (1997); *In re Burlington Northern R.R.*, 249 Neb. 821, 545 N.W.2d 749, 751 (1996)." *City of Auburn* at 1030.

"Pre-ICCTA case law addressing federal preemption over railroad operations also supports a broad reading of the statute." *City of Auburn* at 1030.

**"We believe the congressional intent to preempt ... state and local [environmental] regulation of rail lines is explicit in the plain language of the ICCTA and the statutory framework surrounding it."** *City of Auburn* at 1031. (Emphasis added.)

"Additionally, given the broad language of §10501(b), the distinction between "economic" and "environmental" regulation begins to blur. For if local authorities have the ability to impose "environmental" permitting regulations on the railroad, such power will in fact amount to 'economic regulation" if the carrier is prevented from constructing, acquiring, operating, abandoning, or discontinuing a line." *Id.* at 1031.

The court then concluded: "**State and local permitting laws regarding railroad operations are preempted by the plain language of the ICCTA, and the statutory framework surrounding it.**" *City of Auburn* at 1033. (Emphasis added.)

50. In *Wisconsin Central Ltd., v. The City of Marshfield*, 160 F. Supp. 2d 1009 (W.D. Wis. 2000), the city argued the relocation of railroad property is not its regulation. The court made the following statements:

"**Environmental laws** - statutes of general application - **have been found to be expressly preempted under the ICCTA when applied to facilities and property constituting rail transportation.**" *See City of Auburn,* 154 F.3d at 1031". (Emphasis added.) *Wisconsin Central Ltd.* at 1014.

**16 C. COMPLETE PREEMPTION GUIDELINES**

**Ordinary vs. Complete preemption.**

51. In *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 at 63, 107 S.Ct. 1542 at 1546, 95 L.Ed. 2d 55 (1987), the court made the following comments:

> "Federal pre-emption is ordinarily a federal defense to the plaintiff's suit. As a defense, it does not appear on the face of a well-pleaded complaint, and, therefore, does not authorize removal to federal court. *Gully v. First National Bank,* [299 U.S. 109 at 113, 57 S.Ct. 96 at 98, 81 L.Ed. 70 (1936)]. One corollary of the well-pleaded complaint rule developed in the case law, however, is that Congress may so completely pre-empt a particular area that any civil complaint raising this select group of claims is necessarily federal in character. For 20 years, this Court has singled out claims pre-empted by §301 of the LMRA for such special treatment. *Avco Corp. v. Machinists,* 390 U.S. 557, 88 S.Ct. 1235, 20 L.Ed.2d 126 (1968).
>
> "The necessary ground of decision [in *Avco*] was that the preemptive force of §301 is so powerful as to displace entirely any state cause of action 'for violation of contracts between an employer and a labor organization.' Any such suit is purely a creature of federal law, notwithstanding the fact that state law would provide a cause of action in the absence of §301." *Franchise Tax Board of Cal. v. Construction Laborers Vacation Trust*, 463 U.S. 1 at 23, 103 S.Ct. 2840 at 2853, [77 L.Ed. 2d 420 (1983)]."

52. In cases where complete preemption exists, "any complaint that comes within the scope of the federal cause of action necessarily 'arises under' federal law." *Franchise Tax Board v. Const. Laborers Vac. Trust*, 463 U.S. 1 at 24, 103 S.Ct. 2840 at 2854, 77 L.Ed. 2d 420 (1983).

**Complete preemption guidelines:**

53. This Court has found §310 of the LMRA (*Avco, supra*)

and §§ 502 (a) and 514 (a) of ERISA,[5] *completely* preempt state law. In each of the eight ICA cases addressed by this Court, this Court has held the ICA preempted the State law at issue. See the Supreme Court cases listed in the Appendix on pp. 101-102. In the *Aetna* and *Pilot Life* cases (see footnote 5), this Court enumerated a number of factors a court should consider when trying to decide if a particular federal statute completely preempts state law. A list of those factors, and a review of 49 U.S.C. § 10501(b) in light of those factors, follows:

**A.** Does the statute have expansive preemption provisions? *Aetna* at 2495; Is the pre-emption clause conspicuous for its breadth? *FMC Corp.* 498 U.S. 52, 58, 111 S.Ct. 403, 407; Does the statute use "deliberately expansive" language? *Pilot* at U.S. 46, S.Ct. 1552; Is the statute designed to "establish ... regulation as exclusively a federal concern?" *Pilot, Id.*

The ICCTA's preemption provision is expansive, is conspicuous for its breadth, and uses deliberately expansive language. [The preemptive clauses of 49 U.S.C. §10501(b) and §§502(a) and 514 (a) of ERISA, appear on pages 2 and 5.] The pre-emptive reach of 49 U.S.C. §10501(b) appears to be even broader than that in §502(a). § 502(a) permits concurrent federal and state jurisdiction for §§ 502(a)(1)(B) and (a)(7). The ICCTA specifically removed a previous provision for concurrent state regulation (over wholly intrastate spur, etc. track) that was in the Staggers Rail Act. The pre-emptive reach of the ICCTA is also broader than that in §514(a) of ERISA, for the pre-emptive reach of the ICCTA precludes regulatory remedies provided under both State and all other Federal statutes, whereas §514(a) only precludes all State remedies.

---

5 *Aetna Health Inc. v. Davila*, 542 U.S. 200, 124 S. Ct. 2488 (2004); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 137-139, 111 S.Ct. 478, 482, 112 L.Ed. 2d 474 (1990); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 107 S.Ct. 1549, 95 L.Ed.2d 39 (1987).

**B.** Does the statute create a "comprehensive legislative scheme" for the regulation of its subject matter? *Aetna* at 2495. Does the statute "comprehensively regulate" its subject matter? *Pilot Life* at U.S. 44, S.Ct. 1551. As indicated on page 46 of the Appendix, the ICCTA (and its predecessors) comprehensively regulates the railroad industry.

**C.** Does the statute present a balancing of policy choices, including certain remedies and excluding other remedies? *Aetna* at 2495. The Supreme Court has held §502(a) of ERISA limits enforcement remedies to those specified in §502(a). "Therefore, any state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy conflicts with the clear congressional intent to make the ERISA remedy exclusive, and is therefore pre-empted." *Aetna* at 2495.

The Supreme Court stated in *Pilot Life, op. cit.*, at U.S. 55, S.Ct. 1557: "[I]n enacting § 301 Congress intended doctrines of federal labor law uniformly to prevail over inconsistent local rules." "The uniformity of decision which the Act [ERISA] is designed to foster will help ... to predict the legality of proposed actions without the necessity of reference to varying state laws." *Id.*, U.S. at 56, S.Ct. at 1557. If the States were allowed to have any regulatory authority over transportation by rail carriers, there would be no uniformity of decisions, which would violate the policy of ensuring "fair" (meaning consistent) decisions.

The following statements, made by the Supreme Court in the *Pilot Life* case, are equally applicable to the ICCTA:

> "The Solicitor General, for the United States as *amicus curiae,* argues that Congress clearly expressed an intent that the civil enforcement provisions of ERISA §502(a) be the exclusive vehicle for actions by ERISA plan participants and beneficiaries asserting improper processing of a claim for benefits, and that varying state causes of action for claims within the scope of §502(a) would pose an obstacle to the

purposes and objectives of Congress. *** We agree." *Pilot Life, Id.* at U.S. 52, S.Ct. at 1555.

"In sum, the detailed provisions of §502(a) set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans. The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA." *Pilot Life, Id.* at U.S. 54, S.Ct. at 1556.

**D.** Does the state law "pose an obstacle to the purposes and objectives of Congress?" *Pilot Life* at U.S. 52, S.Ct. 1555. *Aetna* at 2500. Congress wanted rail carriers to be subject to a uniform set of regulations, consistently applied, with decisions rendered in an expeditious manner. State and local regulations are a hodgepodge of regulations, which, if applicable to rail carriers, would pose an obstacle to Congress's purpose of having rail carriers subject to a uniform set of regulations.

**E.** Does the state remedy provide a separate vehicle to assert a claim outside of, or in addition to, the statute's remedial scheme? *Aetna* at 2500. If a state remedy "duplicates, supplements, or supplants" the remedies specified in the ICCTA, then it "conflicts with the clear congressional intent to make the [ICCTA] remedy exclusive and is therefore pre-empted." *Aetna* at 2495. It is preempted under the doctrine of conflict preemption.

In the instant case, the remedies the Respondents are seeking, "supplements or supplants," and are "outside of, or in addition to," the remedies specified in the ICCTA. As such, they conflict with Congress' clearly manifested intent that with

respect to regulation of rail transportation, the remedies in 49 U.S.C. §§101 - 11908 are exclusive and preempt the remedies provided under State law. Therefore, respondents' State-law remedies are pre-empted under the doctrine of conflict preemption.

## 16 D. STATE LAW IS COMPLETELY PREEMPTED

54. The following statements, made in the *Ingersoll* case at U.S. 138, are equally applicable to the ICCTA:

> "Where, as here, Congress has expressly included a broadly worded pre-emption provision in a comprehensive statute such as ERISA, our task of discerning congressional intent is considerably simplified.
>
> "The pre-emption clause is conspicuous for its breadth." ... Its "deliberately expansive" language was "designed to 'establish pension plan regulation as exclusively a federal concern.' " ... Moreover, to underscore its intent that § 514 (a) be expansively applied, Congress used equally broad language in defining the "State law" that would be preempted." *Ingersoll* at U.S. 138-139, S.Ct. 482.

"Section 514(a) was intended to ensure that plans and plan sponsors would be subject to a uniform body of benefits law; the goal was to minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government. Otherwise, the inefficiencies created could work to the detriment of plan beneficiaries. *** Particularly disruptive is the potential for conflict in substantive law. It is foreseeable that state courts, exercising their common law powers, might develop different substantive standards applicable to the same employer conduct, requiring the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction. Such an outcome is

fundamentally at odds with the goal of uniformity that Congress sought to implement." *Ingersoll* at U.S. 142, S.Ct. 484.

55. The preemptive language of the ICCTA uses deliberately expansive language, is conspicuous for its breadth, is designed to limit regulation of transportation by rail carriers to the STB, and is even broader than that in ERISA. The ICCTA has a comprehensive scheme for the regulation of transportation by rail carriers. The ICCTA presents a balancing of policy choices, including certain remedies and excluding others. Congress intended that the preemptive reach of the ICCTA was to be very broad, and was to preempt all State, local and federal statutes which, by their necessary operation, might directly or indirectly, duplicate, supplement or supplant the regulatory scheme embodied in the ICCTA. State or local remedies conflict with Congress' intent to limit regulatory remedies to those embodied in the ICCTA, for State or local remedies, if permitted, would subject rail carriers to decisions inconsistent with those rendered by the STB, would not be as expeditiously rendered as those rendered by the STB, and would defeat a rail carrier's ability to predict the legality of its proposed actions. There can be no doubt, given the long history of federal regulation of railroads, and the explicit language found in the ICCTA, that Congress intended to vest regulatory authority over rail carriers exclusively with the STB, and that all other State, local or federal remedies were to be completely preempted.

## 16 E. CASES HOLDING THE ICA COMPLETELY PREEMPTS STATE AND LOCAL REGULATIONS

56. *Deford v. Soo Line Ry. Co.*, 867 F. 2d 1080, at 1088, 1090, 1091 (8th Cir. 1989); *Friberg v. Kansas City So. Ry. Co.*, 267 F.3d 439, 443, 444 (5th Cir. 2001); *Cedarapids, Inc. v. Chicago, Central & Pac. R.*, 265 F. Supp. 2d 1005 at 1010 (N.D. Iowa 2003); *Dakota, Minn. & Eastern R.R. Corp. v. So. Dakota*, 236 F. Supp. 2d 989, 1005 (D.S.D. 2002). *CSX Transp., Inc. v.*

*Georgia Pub. Serv. Com'n, op.cit.* at 1584. See also the Supreme Court cases cited on pp.101-102 of the Appendix.

## 17. THE ISSUES OF FEDERAL PREEMPTION ARE NOT MOOT

57. Maryland's Court of Special Appeals noted Petitioner's Maryland NOE, was revoked on April 20, 2004, six days before the circuit court motion hearing, where at the Greenspring injunction was issued. The Court of Appeals then concluded that since Petitioner did not have federal rail carrier status on the motion-hearing date, the issue of federal preemption in that case was rendered moot. CSA 13,14. Petitioner would first argue that since the Greenspring facility was continuing to be used for railroad-related purposes on the date the injunction was issued (to store railroad-related equipment), the Board still had exclusive regulatory jurisdiction over that facility, and that the State court did not have the authority to issue the injunction. Petitioner would argue his status as a federal rail carrier is not controlling. The statute does **not** say the facility, or the railroad-related equipment, has to be owned by a federally licensed rail carrier. Quite the contrary. 49 U.S.C. § 10102(9) (A) specifically states "transportation" includes equipment of any kind, **regardless of ownership**, related to the movement of passengers or property by rail.

58. Petitioner would further argue that the injunction became unenforceable on May 5, 2004, when Petitioner regained his rail carrier status, thereby revesting (if it had been lost) the Board with exclusive jurisdiction over this railroad facility. Furthermore, if this court finds that the facility, or equipment being stored at the facility, must be owned by a licensed rail carrier, then, since Petitioner had rail carrier status prior to the date the Court of Special Appeals rendered its opinion, and continues to have rail carrier status, that court did not have jurisdictional authority to render a decision which subjected the Greenspring

facility to State regulatory authority, or which provided for a remedy which was not contained in 49 U.S.C. §§ 10101-11908.

59. Petitioner would argue taking judicial notice of the Board's 2/23/05 decision, revoking Riffin's third Notice of Exemption, without also taking judicial notice of the Board's 12/14/05 decision, granting Riffin authority to operate a line of railroad in Allegany County, Maryland, would violate the due process and equal protection clauses of the U.S. Constitution.

## 18. THE ICCTA PROHIBITS A LOCAL OR STATE AGENCY FROM REQUIRING THAT PERMITS BE OBTAINED PRIOR TO RAILROAD-RELATED CONSTRUCTION ACTIVITIES

60. In *CSX Transportation, Inc. – Petition for Declaratory Order*, STB Docket No. 34662, decided 3/14/05, the Board addressed the scope of the ICCTA preemption. [This decision appears on p. 69 of the Appendix.] On p.6 of its decision, the Board made the following germane comments:

"The District contends that section 10501(b) only preempts direct "economic" regulation of railroads, and not a state or local measure aimed at protecting its residents. However, as the courts that have examined that provision have uniformly concluded, any notion that the statutory preemption in section 10501(b) is limited to direct state and local economic regulation is contrary to the broad language of the statute and unworkable in practice. *See, e.g., Friberg,* 267 F.3d at 443; *City of Marshfield,* 160 F.Supp.2d at 1014 (section 10501(b) is broad enough to "expressly preempt more than just those laws specifically designed to regulate rail transportation"). ... Thus the scope of section 10501(b) is broader than just direct economic regulation of railroads."

"However, the courts have made clear that state or local permitting or preclearance requirements of any kind that

would affect rail operations (**including building permits, zoning ordinances, and environmental and land use permitting requirements**) are preempted. *See, e.g., City of Auburn,* 154 F.3d at 1029-31; *Soo; Austell; Ridgefield Park."* (Emphasis added.)

61. In *City of Auburn v. U.S. Government, supra,* at 1033, the 9th Circuit Court of Appeals held:

"State and local permitting laws regarding railroad operations are preempted by the plain language of the ICCTA, and the statutory framework surrounding it."

62. In *CSX Transp., Inc. v. Georgia Public Serv. Com'n,* 944 F. Supp. 1573, 1581 (N.D. Ga. 1996), that court stated:

"The most natural reading of section 10501 (b)(2) is that the federal remedies provided by the ICC Termination Act **are the only remedies available** as to the regulation of rail transportation, and that **the federal remedies are exclusive of state remedies** except where the ICC Act has expressly provided otherwise.

63. As stated in *Soo Line R. Co. v. City of Minneapolis,* 38 F. Supp. 2d 1096, 1099 (D. Minn. 1998):

"Thus, when section 10501 (b) grants the STB exclusive jurisdiction over "transportation by rail carriers," **it logically includes** the yard, **property, facilities** and any intermodal equipment used in connection with a railroad, or related to the movement of passengers or property." (Emphasis added.)

64. At the U.S. District Court hearing, Mr. Snyder, attorney for Respondent MDE, made the following statement:

"The state agrees that economic regulation, state and

local economic regulation has been held to be completely preempted by the ICCTA." T. (USDC) 28.

## 19. A RAILROAD FACILITY NEED NOT BE ADJACENT TO A RAILROAD'S MAIN LINE, OR IN THE SAME STATE AS A RAILROAD'S MAIN LINE, OR OWNED BY A FEDERALLY LICENSED RAIL CARRIER IN ORDER TO BE AN 'INSTRUMENTALITY OF INTERSTATE COMMERCE,' SUBJECT TO THE EXCLUSIVE JURISDICTION OF THE STB.

65. In *CSX Transp., Inc. v. Georgia Public Serv. Com'n, op. cit.*, at 1585, the court made the following comments:

> "Congress has authority to regulate even intrastate aspects of the operation of railroads because railroads are instrumentalities of interstate commerce. *See United States v. Bishop,* 66 F.3d 569, 588 (3d Cir. 1995) (holding that Congress can regulate motor vehicles as an instrumentality of interstate commerce and stating "the Supreme Court has made clear that airplanes, railroads, highways and bridges constitute instrumentalities of commerce which Congress can regulate under the commerce clause"). Congress has more authority to regulate instrumentalities of interstate commerce because instrumentalities of interstate commerce, as the means of transporting goods and people across state lines, have an inherently substantial effect on interstate commerce.

## 20. ROOKER - FELDMAN DOCTRINE

66. There are several exceptions to the *Rooker-Feldman* doctrine: "If the preemptive force of the federal statute is so powerful as to displace entirely any state cause of action ... ." *Franchise Tax Bd. V. Const. Laborers Vac. Trust*, 463 U.S. 1, 23, 103 S. Ct. 2840, 2853, 77 L.Ed. 2d 420 (1983)."

## 21. WHEN STATE LAW IS PREEMPTED, THE

## QUESTION OF HARM TO THE STATE AND THE MATTER OF THE PUBLIC INTEREST DROP FROM THE CASE

67. In *Bank One, Utah v. Guttau*, 190 F.3d 844 at 847-848 (8th Cir. 1999), that court made the following statement:

> "If Bank One proves that the relevant provisions of the Iowa EFT are preempted by the NBA and that it will suffer irreparable harm if the State is not enjoined from enforcing those provisions, then the question of harm to the State and the matter of the public interest drop from the case, for Bank One will be entitled to injunctive relief no matter what the harm to the State, and the public interest will perforce be served by enjoining the enforcement of the invalid provisions of state law."

68. In *Dakota, Minn. & Eastern R.R. Corp. v. South Dakota*, 236 F. Supp. 2d 989, (D.S.D. 2002), that court made the following statements:

> "Since the instant action is one against the State, money damages are not recoverable. The threat of unrecoverable economic loss does qualify as irreparable harm. *See Baker Elec. Coop., Inc. v. Chaske*, 28 F.3d 1466, 1473 (8th Cir. 1994)." *Dakota* at 1013.

> "This Court agrees with that conclusion and finds that the ICCTA has preempted all state efforts to regulate railroads." *Dakota* at 1005.

## 22. MATERIAL FACTS WERE IN DISPUTE

69. The Court of Special Appeals held that resolution of several facts, while in dispute, "will do little to determine whether appellant, without ever having applied for or obtained the required permits, cleared, filled, and graded approximately

9,000 square feet of land within the 100-year floodplain." Opinion at 17. Whether Petitioner disturbed 9,000 square feet of land within the 100-year floodplain is not in dispute. **What is in dispute, is whether Appellees' regulations have been preempted, and if not, whether Petitioner's activities violated the statutes cited by Appellees, and if so, what penalties Petitioner would be subject to.**

70. Resolution of the disputed facts will determine whether Petitioner actually violated any of the statutes cited by Respondents, and if so, what the maximum potential fine would be.

71. Since material facts were in dispute, it was not appropriate for the circuit court to grant Respondents request for summary judgment. Judgment should have been rendered after a trial, where these disputed material facts could have been resolved. It should be noted, the Cockeysville trial court **did not** make any findings of fact.

## 23. PETITIONER WAS DENIED DUE PROCESS AND EQUAL PROTECTION OF THE LAW, WHEN THE STATE APPELLATE COURT FAILED TO RULE ON THE COMMON LAW RIPARIAN-RIGHTS ISSUES RAISED BY THE PETITIONER.

72. Maryland's case law has long held that if one or more upper landowners engage in earth-disturbing activities which result in increased flow of water over a lower landowner's property, then that lower landowner **may repel with levees or fill material, waters unlawfully placed upon the lower landowner's property.** None of the statutes relied upon by Respondents, have express language which state they abrogate, supercede, or modify the common law or Maryland's case law regarding riparian rights. Maryland's Environment Article specifically states: "The provisions of this subtitle do not impair any riparian or other vested right ... ." §5-512 Environment Art.

(applicable to §5-503 Env. Art.) "This subtitle [Subtitle 3. Water Pollution Control.] does not take away the right of any person, as a riparian owner or otherwise, in equity, at common law, or under statutory law to suppress a nuisance or abate pollution." § 9-303, Env. Art. (applicable to §§9-322 and 9-323, Env. Art.)

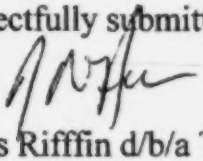
73. The filling, grading and levee building activities at Petitioner's Cockeyville site, were designed to repel the unlawful flood waters emanating from the stream which flows through Petitioner's property. As such, these activities were expressly permitted by Maryland's common law, which Maryland's Environment Article specifically states has not been abrogated or modified by Maryland's Environment Article. Petitioner argued in the trial court and at the appellate level, that even if regulation of his Cockeysville site was not preempted by 49 U.S.C. §10501(b), Petitioner still had the right under Maryland's common law, to construct the levee he built on his property, and to fill in the floodplain on his Cockeysville property. Maryland's Court of Special Appeals did not address any of these issues. Petitioner would argue the court's failure to address these issues, and the court's failure to permit Petitioner to do what the court had permitted other Maryland citizens to do, violated Petitioner's Constitutional due process and equal protection rights.

THEREFORE, the regulation of these two railroad facilities lies exclusively with the Surface Transportation Board.

WHEREFORE, your Petitioner respectfully requests this Court grant Petitioner's Petition for *Writ of Certiorari*, then reverse the State court decisions, then remand this case back to the State court with instructions to dismiss Respondents Complaints with prejudice, or to issue a permanent injunction against the Respondents, enjoining Respondents from attempting to subject Petitioner's railroad facilities to State or local law [as the Court of Appeals did in the *Bank One, op.cit.*, case,] or

remand this case back to the U.S. District Court with instructions to reinstate Petitioner's Complaint for Injunctive Relief, or for such other relief as may be appropriate.

Respectfully submitted,



James Rifffin d/b/a The Northern Central Railroad
and the Frostburg Southern Railroad, Petitioner

# APPENDIX

| | | |
|---|---|---|
| James Riffin | * | IN THE<br>COURT OF APPEALS |
| v. | * | OF MARYLAND |
| DEPARTMENT OF THE ENVIRONMENT, *et. al.* | * | Petition Docket No. 93<br>September Term, 2006 |
| | * | (Nos. 1593 & 1802,<br>Sept. Term, 2004<br>Court of Special Appeals |

* * * * * * * * *

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals and the answers filed thereto, in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert M. Bell

Chief Judge

DATE: June 16, 2006

BLANK PAGE

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

Nos. 1593 & 1802

September Term, 2004

---

JAMES RIFFIN

v.

MARYLAND DEPARTMENT OF THE ENVIRONMENT, *et. al.*

---

Salmon,
Adkins,
Sharer,

JJ.

---

Opinion by Sharer, J.

---

Filed: February 3, 2006

In this consolidated appeal,[1] we address appellant, James Riffin's, thoroughly litigated contention that, doing business as the Northern Central Railroad ("NCR"), his operations are subject to the exclusive jurisdiction of the United States Surface Transportation Board ("STB") and pursuant to the Interstate Commerce Commission Termination Act ("ICCTA"), 49 U.S.C. §10501(b)[2], cannot be regulated by appellees, the Maryland Department of the Environment ("MDE") and Baltimore County ("the County").

Appellant, appearing in this Court *pro se*, as he did below, presents a number of issues for our review, which we have

---

1 On June 20, 2005, following the filing of various motions, this Court issued an order consolidating "[t]he appeal in No. 1802, September Term, 2004 ... with the appeal in No. 1593, September Term, 2004, for purposes of briefing and argument only."

2 49 U.S.C. §10501(b) (1996) provides:

(b) The jurisdiction of the Board over –

(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and

(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,

is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

distilled and rephrased to:[3]

1. Whether the circuit court erred in granting summary judgment in favor of appellees.
2. Whether appellant's due process rights were violated when the circuit court granted the permanent injunction.[4]

Finding that the circuit court neither erred nor violated appellant's due process rights, we shall affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

### Case No. 1802 – The Greenspring Drive Site

Appellant is the owner and lessor of commercial property located at 1941 Greenspring Drive, Timonium, Maryland.[5] The

---

3 In his brief, appellant raised 21 issues with approximately 22 sub-contentions. For completeness we set out his issues, verbatim, in the Appendix to this opinion.

Appellant worded the issues upon which we focus in this opinion as follows:

15. Is the Permanent Injunction issued by the Circuit Court of Baltimore County on November 19, 2004, void, due to a lack of due process?
16. Were there material facts in dispute which would make summary judgment inappropriate?

4 On September 13, 2004, appellant appealed the circuit court's issuance of the preliminary injunction. None of the issues raised in this appeal, however, address the preliminary injunction. As such, any arguments regarding the preliminary injunction have been waived. *See Honeycutt v. Honeycutt*, 150 Md.App. 604, 618 (2003); Md. Rule 8-504(a)(5).

5 In an earlier incarnation, appellant sought a special exception from Baltimore County zoning regulations to utilize the property as a "commercial recreation facility." The Baltimore County Board of Appeals denied the request, determining that the use sought would actually be a "bungee jumping operation," which is prohibited by the

majority of the approximately 0.7 acre site is occupied by an office building, bordered by small strips of land. There are no railroad tracks or active rail operations on the property.

Appellant leases space in the office building to three tenants – an office support company, a sign-making company, and a document preparation service. None of the tenants hold themselves out as a railroad or as providing rail services.

From approximately 1987 to 1990, the property's previous owner used the site for the production of printed electronic circuit boards. In 1989, investigations revealed high levels of volatile organic compounds and other contaminants in the soil and groundwater beneath the surface of the property. A follow-up survey, conducted by the Environmental Protection Agency and the MDE, in 2000, concluded that the site's potential groundwater contamination required further investigation by the MDE.

On October 12, 2000, the MDE notified appellant of the potential hazard and requested that he conduct his own investigation to "accelerate any necessary remedial actions" at the site. After appellant failed to respond, the MDE issued an administrative order, on July 5, 2001, requiring appellant to perform an assessment of the environmental conditions at the site and to undertake remedial measures if the conditions proved adverse to human health or the environment. Appellant failed to respond to the administrative order.

Appellant ultimately agreed to give the MDE access to conduct an environmental investigation of the site, which the MDE performed on April 25, 2002. The soil and groundwater data gathered during the MDE's investigation indicated levels of

---

Baltimore County Code. This Court affirmed that judgment in *Riffin v. People's Counsel for Baltimore County*, 137 Md.App.90 (2001).

contaminants in the groundwater sufficient to pose a potential health danger to the tenants at the site. Based on this information, the MDE requested full access in order to conduct indoor air sampling and monitoring to determine the extent of any environmental and health hazards. Although appellant initially indicated that he would allow the MDE access, he revoked his consent before any indoor air quality tests could be performed.

On December 1, 2003, after repeated attempts to obtain appellant's compliance with the administrative order, the MDE filed a complaint, in the Circuit Court for Baltimore County, seeking an injunction giving the MDE access to the Greenspring Drive site to implement the planned indoor air quality testing.[6] Appellant filed a motion to dismiss, claiming that the MDE had no jurisdiction over the site because, since February 1, 2003, he had been doing business as the NCR and, therefore, was subject to the exclusive jurisdiction of the STB pursuant to the ICCTA, 49 U.S.C. §10501(b).

On April 26, 2004, the Circuit Court for Baltimore County rejected appellant's argument and orally granted the MDE access to the Greenspring Drive site. The court's written order, filed May 3, 2004, gave the MDE "full unimpeded access to the building located at 1941 Greenspring Drive, Timonium, Maryland, for purposes of monitoring indoor air quality."

On April 27, 2004, appellant removed the case to the United States District Court for the District of Maryland on the grounds that 49 U.S.C. §10501 preempted the State's environmental

---

6 The MDE sought to perform the monitoring pursuant to Md.Code Ann., Envir. §7-222(a), (c)(2) (Repl.Vol.1996) ("EA"), which authorizes the MDE to address the unauthorized release of hazardous substances. This section allows the MDE to enter a site if necessary to conduct remedial actions or other measures and to pursue an injunction if access is denied.

laws. The U.S. District Court rejected appellant's arguments on September 8, 2004, and remanded the case to the Circuit Court for Baltimore County, which had entered a final judgment in the matter some four months earlier. Appellant filed this appeal on September 21, 2004.[7]

**Case No. 1593 – The Cockeysville Site**

Appellant also owns a parcel of land located at 10919 York Road, Cockeysville, Maryland. This parcel lies adjacent to Beaver Dam Run, a tributary of the Gunpowder River, which in turn feeds into the Loch Raven Reservoir, the primary water supply for metropolitan Baltimore.[8] A portion of the Cockeysville site lies within the 100-year floodplain of Beaver Dam Run.

In February 2004, appellant began construction of what he claimed would become a railroad storage yard at the site. Over the next few months appellant cleared, filled, and graded approximately 9,000 square feet of land, stockpiled soil and crushed stone, and constructed a make-shift berm and concrete retaining wall. All of this work was performed within the 100-year floodplain of Beaver Dam Run. Appellant had neither applied for nor received any of the permits and approvals required under state and local law.

Baltimore County officials discovered the work on February 24, 2004, and confirmed that appellant had not obtained the sediment control, flood plain, and grading approvals required by

---

7 This appeal was originally dismissed by this Court on January 12, 2005, on the grounds that it was not timely filed. By order, dated June 20, 2005, we vacated our earlier order and reinstated the appeal.

8 Beaver Dam Run qualifies as a Use III-P Maryland waterway, COMAR 26.08.02.08I(4), protected as a natural trout water and public supply. COMAR 26.08.02.02B(5).

the County. The County then notified the MDE, which first noted the violations in a March 4, 2004, inspection report.[9] The State and County issued multiple stop-work orders. When confronted with the possibility of further enforcement action, appellant told an MDE inspector "that [the inspector] could issue whatever [the inspector] wanted, but [appellant] would not stop his activities because he was a railroad and, as such, was immune from all state environmental regulations."

The MDE and the County, jointly, filed suit in the Circuit Court for Baltimore County on August 25, 2004. The complaint alleged that appellant's construction work violated four separate State and County laws and sought, *inter alia,* an injunction that would require appellant to restore the property to its original condition.

On August 30, 2004, the circuit court issued a temporary restraining order preventing appellant from conducting any further construction activities at the site. Three days later appellant filed a motion to dismiss.

That same day, September 2, 2004, appellant removed the case to the U.S. District Court for the District of Maryland on preemption grounds. On September 8, 2004, the U.S. District Court rejected appellant's argument and remanded the case to the circuit court.

---

9 Appellant's construction activities violated four separate regulatory requirements: (1) grading and filling within the 100-year floodplain without a permit, EA §5-503 and COMAR 26.17.04.03A; (2) placing stockpiled, exposed, and un-stabilized soil within the 100-year floodplain without a permit, EA §4-413; (3) failing to implement an approved erosion and sediment control plan prior to any land disturbance, EA §4-105(a) and Baltimore County Code §33-5-104(a)(3); and (4) discharging pollutants into the waters of the State without a permit, EA §9-322.

In open court, at the hearing on September 9, 2004, the circuit court converted appellant's motion to dismiss into a motion for summary judgment. The court also issued a preliminary injunction requiring appellant to remove and relocate material from the site.[10] The MDE and the County filed a cross motion for summary judgment on September 27, 2004.

On November 23, 2004, the circuit court denied appellant's motion to dismiss / motion for summary judgment, granted appellees' cross motion for summary judgment, and issued a permanent injunction. The permanent injunction required appellant "to comply with all applicable provisions of State and local law," cease further excavation, stabilize all exposed soils, install the necessary sediment controls, "relocate all equipment" on the site, and refrain from interfering with the activities of the MDE or the County. Appellant filed his timely appeal on December 2, 2004.

Six days after filing this appeal, appellant moved to stay the enforcement of the permanent injunction. That motion was never ruled upon and the record was sent to this Court on December 28, 2004. On January 31, 2005, appellant moved to stay the enforcement of the permanent injunction in this Court.

---

10 On September 16, 2004, appellant filed suit in U.S. District Court seeking to essentially appeal both [the District Court's] previous jurisdictional holdings and the state court's grant of the Preliminary Injunction against him. Specifically, [appellant] seeks to have this Court enjoin individuals in the Maryland Attorney General's Office and the Baltimore County Attorney's Office from enforcing the terms of the Preliminary Injunction granted by the state court.
*Riffin v. Snyder*, No. RDB 04-2964, slip op. at 2 (D. Md. Sept. 16, 2004). The U.S. District Court dismissed the case the very same day. Appellant appealed to the United States Court of Appeals for the Fourth Circuit Court, which affirmed. The issues concerning these federal cases, raised in appellant's brief, are not properly before this Court.

In an order dated February 17, 2005, we denied appellant's motion. Appellant's petition for review of this Court's order was denied by the Court of Appeals on February 28, 2005.

**The Northern Central Railroad**

As a prologue to our discussion of the issues raised in this appeal, we must address appellant's contention that, doing business as the NCR, his operations constitute a railroad, subject to the exclusive jurisdiction of the STB.

In his brief, appellant contends that "[i]n 1999, [he] attempted to reinstitute rail service from Preston to the Choptank river, and from Goldsboro to the Choptank river." Although this contention cannot be verified from the record before us, the record does reveal that following the MDE's April 25, 2002 environmental investigation at the Greenspring Drive site, and before the MDE filed suit in Baltimore County, the NCR was formed.[11] Appellant then sought approval from the STB to begin operating the NCR.

The STB's approval process is described as follows:

> Under the licensing provisions of 49 U.S.C. 10901, a noncarrier, such as NCR, may acquire and operate a rail line only if the Board makes an express finding that the proposal is not inconsistent with the "public convenience and necessity." That means that the Board must examine and weigh the public interest. Under 49 U.S.C. 10502 and 49 CFR 1121, however, a party may request an exemption from the formal application procedures of section 10901, on the

---

11 The exact date of the NCR's formation is unclear. In a July 13, 2003 letter to the STB, appellant stated that the company was formed on May 15, 2003. Appellant's motion to dismiss the Greenspring Drive case, however, states that the NCR was "formed on February 1, 2003."

grounds that full regulatory scrutiny is not necessary to carry out the rail transportation policy and that either the exemption is limited in scope or regulation is not needed to protect shippers from an abuse of market power.

There are some situations in which approval would be so routine and uncontroversial that there is an expedited "class exemption" procedure allowing parties to obtain Board authorization subject only to an after-the-fact Board review if objections are received. Thus, under 49 CFR 1150.31, a noncarrier can obtain approval to acquire and operate a line of railroad within 7 days. That authority can later be revoked under 49 U.S.C. 10502(d) or treated as void *ab initio* if the exemption notice if found to have contained false or misleading information. Moreover, the class exemption process is not appropriate for controversial cases in which a more detailed record is required than is produced through a notice of class exemption.

*James Riffin D/B/A The Northern Central Railroad,* STB Finance Docket No. 34484, 2004 WL 839306 (Apr. 20, 2004) (citations omitted) ("Riffin 4/20/04").

Appellant filed three separate notices of exemption ("NOE") with the STB in an attempt to obtain authorization to operate a railroad. In the first NOE, filed July 7, 2003, appellant sought the authority to "construct and operate" 20.9 miles of industrial track near Cockeysville, Maryland. Appellant also sought authority to "acquire trackage rights from Norfolk Southern Corporation," without having consulted Norfolk Southern.[12]

---

12 On July 11, 2003, Norfolk Southern Railroad Company, through its counsel, advised the STB that "there are no current or planned discussions between it and [appellant] that would lead to either the grant of trackage rights over tracks operated by Norfolk Southern or to the right to construct any tracks that would tie into tracks operated by Norfolk Southern." As such, Norfolk Southern

*James Riffin D/B/A NCRR,* STB Finance Docket No. 34375, 2003 WL 21662810 (Jul. 15, 2003). On July 14, 2003, appellant filed a letter withdrawing his verified NOE. *Id.*

On March 8, 2004, appellant filed his second NOE with the STB requesting permission to acquire and operate 2.9 miles of rail line in Baltimore County and 20.9 miles of rail line in York County, Pennsylvania. STB Finance Docket No. 34484. Pursuant to the STB's regulations, this NOE became effective and received formal approval on March 25, 2004.

The State of Maryland ("Maryland") filed a petition on April 2, 2004, requesting the STB to revoke appellant's second NOE. In an April 20, 2004 decision, the STB revoked appellant's exemption, stating:

> While NCR claims that it can overcome impediments to its ownership of property at issue in this proceeding, Maryland has raised sufficient concerns here, not only regarding NCR's ability to obtain title to property, but also regarding NCR's proposal in general, to make it inappropriate for NCR to use the expedited class exemption procedures in this case. Given that there are substantial factual and legal issues raised and that the Board has responsibility to protect the integrity of its processes, under the particular circumstances presented here, the Board will revoke the notice of exemption.

*Riffin* 4/20/04, *supra* (footnote omitted).

On April 28, 2004, appellant filed his third and final NOE with the STB, requesting permission "to acquire (via a lease) and operate approximately 19 miles of line ... in York County, PA." STB Finance Docket No. 34501. Maryland filed a motion for leave to file comments, accompanied by the comments, on May

---

"strongly [urged] the Board to stay the effectiveness of the [NOE]."

18, 2004.[13] Two days later appellant's third NOE received approval.

On August 20, 2004, Maryland filed a petition to revoke appellant's third NOE. Appellant filed his answer to Maryland's petition, as well as a petition for declaratory order, on September 14, 2004, asking the STB to render a formal decision regarding, *inter alia,* appellant's status as a Class III rail carrier.

Subsequent to the filing of his appeals in the cases presently before this Court, but prior to our review, the STB revoked appellant's third NOE in a February 23, 2005 decision, stating that:[14]

> it appears that NCR is attempting to use the cover of Board authority allowing rail operations in Pennsylvania to shield seemingly independent operations and construction in Maryland from legitimate processes of state law. Maryland has shown its legitimate state interest in construction matters within its borders and, once again, has raised sufficient concerns regarding NCR's proposal to make it inappropriate for NCR to use the expedited class exemption procedures in this case. *See April 20, 2004 Decision.* The Board has a responsibility to protect the integrity of its processes, and the Board is concerned that [appellant] may be using the licensing process in improper ways. Given the particular circumstances and controversy presented here, the Board will revoke the exemption in STB Finance Docket No. 34501.

*James Riffin D/B/A NCRR,* STB Finance Docket No. 34501,

---

13 Appellant replied to these comments on June 2, 2004.

14 We take judicial notice of the STB's February 23, 2005 revocation of appellant's railroad status because the revocation is a fact capable of accurate and ready determination by a resort to the STB decision, the accuracy of which, as a public document, cannot reasonably be questioned. *See* Md. Rule 5-201(b).

2005 WL 420419 (Feb. 23, 2005) (footnote omitted) ("Riffin 2/23/05").

The STB also addressed appellant's declaratory order request, stating:

> [G]iven the context in which [the declaratory order request] was filed – as an adjunct to a second notice to obtain authority to provide operations about which substantial questions have been raised – we see no basis for granting the petition for declaratory order at this time. The declaratory order petition raises numerous questions about precisely how non-railroad activities could be shoehorned into the 49 U.S.C. 10501(b) preemption so as to shield them from the otherwise legitimate reach of state law. But because *NCR has no authority to conduct any railroad operations at this time* and because serious questions have been raised about the bona fides of its proposals, we will not speculate on how we might rule if it did have such authority. Accordingly, we decline to institute a proceeding on NCR's petition for declaratory order.

*Riffin 2/23/04, supra* (emphasis added).

## DISCUSSION

### Appellant's Railroad Status

On April 20, 2004, six days *before* the circuit court's hearing in the Greenspring Drive case (No. 1802), the STB revoked appellant's second NOE, thereby eliminating any claim or authority that he might assert to operate a railroad and / or subject his operations to the STB's exclusive jurisdiction. Because his third NOE was not filed until April 28, 2004, appellant was precluded from claiming any authority under it before the circuit court on April 26, 2004. Even assuming, as appellant argues, that the third NOE automatically became effective seven days after it was filed, appellant did not receive

authority from the STB until after the circuit court issued its May 3, 2004 order.

Additionally, we note that the STB's February 23, 2005 decision effectively revoked any authority that appellant's third NOE may have provided subsequent to the issuance of the circuit court's order. Thus, the record clearly indicates that before the circuit court, as well as this Court, appellant has no authority to either operate a railroad or invoke the STB's exclusive jurisdiction.

We hold that, because appellant's appeal of the Greenspring Drive case (No. 1802) is premised entirely upon his contention that he is "a federally licensed Class III rail carrier," and presents no other issues, the case is moot. *See Coburn v. Coburn,* 342 Md. 244, 250 (1996) ("A case is moot when there is no longer an existing controversy between the parties at the time it is before the court so that the court cannot provide an effective remedy.").

Therefore, we decline any invitation to address the merits of the Greenspring Drive case and shall dismiss the appeal in No. 1802 as moot. *See id.;* Md. Rule 8-602(a)(10). As such, the circuit court's May 3, 2004 order granting the MDE "unimpeded access" to the Greenspring Drive building remains in effect.

In the Cockeysville case (No. 1593), we hold that the STB's February 23, 2005 revocation of appellant's third NOE renders any preemption issues, or arguments by appellant that his conduct is subject to the exclusive jurisdiction of the STB, moot. Similarly, we will not entertain any of these moot issues relating to appellant's status as a railroad because any opinion on these issues "would be an academic undertaking." *B&P Enters. v. Overland Equip. Co.,* 133 Md.App. 583, 639 (2000).

Our further discussion, therefore, will focus only on two relevant state law issues raised in appellant's brief.

**1. Whether the circuit court erred in granting summary judgment in favor of appellees.**

Appellant argues that "it was inappropriate for the circuit court to grant [appellees'] Cross Motion for Summary Judgment" because there are ten facts which "are material, and are in dispute." A review of appellant's ten "facts" reveals, however, that no less than four relate to appellant's claim of railroad status. As discussed, *supra*, issues related to appellant's railroad status were rendered moot by the STB's February 23, 2005 decision and are not properly before this Court. Therefore, we address appellant's six remaining facts in turn.

Pursuant to Maryland Rule 2-501(f), a court shall grant summary judgment "if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law." This Court will review the grant of summary judgment *de novo* and will

> determine whether there is any dispute of material fact, and, if there is none, we then determine whether the court was legally correct in its ruling. As we undertake this review, " 'we construe the facts properly before the court, and any reasonable inferences that may be drawn from them, in the light most favorable to the non-moving party.' " "We ordinarily will uphold the grant of summary judgment only on a ground relied on by the trial court.' "

*Stanley v. American Fed'n of State & Mun. Employees Local No. 553*, 165 Md. App. 1, 13 (2005) (citations omitted).

In his brief, appellant contends that the following facts are both material and disputed:[15]

---

15 We adopt appellant's *seriatim* alphabetical designation.

E. Does the scope of [appellant's] present construction plans exceed one acre?
F. Did [appellant] install sediment controls prior to his land disturbing activities at his Cockeysville facility?
G. On what date did [appellant] first "change the natural ground level' at his Cockeysville facility?
H. Did [appellant] construct an obstruction in, or change the cross-section of, a "stream or body of water?"
I. Did [appellant] place soil in a position where it was "likely to be washed into waters of the State by runoff?"
J. What was the cost to re-install sediment controls and to restore the Cockeysville site to a stable condition?

We find, however, that these facts were either immaterial or not in dispute before the circuit court.

**Immaterial Facts**

The Court of Appeals has stated that

> [i]n order to prevent the granting of a motion for summary judgment the objecting party must show more than that there was a question of fact presented, he must, of course, also show that the resolution of that question will somehow affect the outcome of the case, *i.e.*, that it is a material fact.

*Parklawn, Inc. v. Nee*, 243 Md. 249, 254 (1966).

Here, appellant has failed to demonstrate how the resolution of (1) whether the scope of appellant's *present* construction plans exceed one acre; (2) whether appellant installed sediment controls prior to his land excavating activities;[16] (3) the *date*

16 We noted that, along with being immaterial, appellant stipulated to appellee's counsel proffer that he "had installed a silt fence at one point in the past," and that the "silt fence had been overrun and buried by dirt at the site and was no longer functional"

appellant first changed the natural ground level at the site; and (4) the *cost* to re-install sediment controls and restore the site, will affect the outcome of the case. Resolution of these facts will do little to determine whether appellant, without ever having applied for or obtained the required permits, cleared, filled, and graded approximately 9,000 square feet of land within the 100-year floodplain.

Based upon our review of the record, we hold that facts enumerated by appellant in paragraphs E, F, G, and J of his brief, while disputed, are immaterial because their resolution would not affect the outcome of the case. *See Stewart Title Guar. Co. v. West* 110 Md. app. 114, 133 (1996).

**Undisputed Facts**

Facts enumerated in paragraphs H and I of appellant's brief, although material, were not in dispute before the circuit court. Our review of the record reveals that appellant stipulated that he had constructed an obstruction in, or changed the cross-section of, a stream or body of water.

Attached as an exhibit to appellees' cross-motion for summary judgment, was the September 9, 2004 preliminary injunction hearing transcript. That transcript discloses appellant's stipulation to appellees' counsel's proffer, which included statements that:

> [Appellant] also graded the floodplain flat in preparation for construction of a railroad. All of this grading had the affect of changing the cross section of the 100 year floodplain at Beaver Dam Run.

Additionally, whether appellant placed soil in a position where it was "likely to be washed into waters of the State by runoff," in contravention of Md. Code Ann., Envir. §4-413 (Repl. Vol. 1996) ("EA"), was not at issue before the circuit

court.

Section 4-413 provides, in pertinent part, that

> it is unlawful for any person to add, introduce, leak, spill, or otherwise emit soil or sediment into waters of the State **or** to place soil or sediment in a condition or location where it is likely to be washed into waters of the State by runoff of precipitation or by any other flowing waters. (emphasis added).

The Environment Article consistently defines waters of the state as including "[t]he *floodplain* of free-flowing waters determined by the Department of Natural Resources on the basis of the 100-year flood frequency." *See* EA §§4-101.1(d)(2), 5-101 (j)(5), and 9-101(1)(2) (emphasis added). During the motions hearing before the circuit court on November 18, 2004, appellant acknowledged that:

> Since waters of the state is defined as the floodplain, I would have to agree with the state's position that, have I introduced soil into the floodplain of Beaver Dam Run? Yes, I have.

Thus, that issue was conclusively resolved.

Viewing the evidence in the light most favorable to appellant, we find that the circuit court was legally correct in its ruling, and did not err in granting appellees' motion for summary judgment.

**2. Whether appellant's due process rights were violated when the circuit court granted the permanent injunction.**

Appellant argues that the circuit court abused its discretion in granting the permanent injunction because "[a] copy of the proposed order was not served on [him] prior to being signed by the court." Specifically, appellant contends that the permanent

injunction is "void, due to lack of due process." We disagree.

Appellant cites *Madaio v. Madaio*, 256 Md. 80, 83 (1969), for the proposition that "[t]he right to receive notice and to be afforded an opportunity to be heard in any proceeding to which finality is to be accorded is established beyond question in this country." While this is an accurate staement of the law, *Madaio* is inapposite to the present case.

In *Madaio,* the Circuit Court for Montgomery County, on December 20, 1966, denied Mr. Madaio's complaint for divorce but ordered him to pay child support and alimony "pending further Order of Court." *Id.* at 81. Two years later, on December 27, 1968, Mr. Madaio obtained a divorce in the Circuit Court for Arlington County, Virginia. *Id.* Mrs. Madaio was never personally served in Virginia and did not appear to contest the action. *Id.* The decree did not contain any provision for her support. *Id.*

One month after obtaining the divorce decree in Virginia, Mr. Madaio filed a motion in the Circuit Court for Montgomery County to vacate the December 20, 1966 *pendente lite* support orders and to have the case dismissed. *Id.* A copy of this motion was not received by Mrs. Madaio's attorney until January 30, 1969. *Id.* at 81-82.

On that same day, the circuit court, *without a hearing*, ordered that Mr. Madaio' motion be granted and the case dismissed. *Id.* at 82. Mrs. Madaio claimed that she was not notified of the court's order until February 6, 1969. On February 13, Mrs. Madaio filed a motion to strike the court's order "on the ground that she had not been afforded an opportunity to be heard." *Id.* On February 25, the circuit court, without an opinion, denied Mrs. Madaio's motion to strike and allowed the January 30th order to stand. *Id.* The Court of Appeals reversed. *Id.* At 85.

Unlike *Madaio*, in the case *sub judice*, appellant was provided an opportunity to be heard, and was in fact heard, at every stage of the proceedings. Appellant was present at the September 9, 2004 hearing and received a copy of the preliminary injuunction. The material terms of the preliminary injunction were identical to those of the permanent injunction, and differed only in scope. Appellant, therefore, cannot, in good faith, argue that he was not apprized of what issues would be addressed by the permanent injunction.

Appellant was afforded the "opportunity to show cause why [the permanent injunction's] objectionable provisions are not warranted" at the November 18, 2004, motions hearing. As such, appellant's due process rights were not violated when the proposed order was signed by the court prior to his being served with a copy.[17]

**JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY IN CASE NO. 1593 AFFIRMED;**
**CASE NO. 1802 DISMISSED AS MOOT;**
**COSTS ASSESSED TO APPELLANT.**

Appendix[18]

---

17 Without citing a single case, appellant contends, in his brief, that, "[n]umerous times, Maryland's Court of Appeals has ruled if a proposed order has not been served on a party prior to the court signing the order, then that order is void." The only case of which this Court is aware is a criminal case in which, unlike the present case, a proposed consent order for restitution was not sent to a party *and* the court signed the order without a hearing. *See e.g. Lopez-Sanchez v. State*, 388 Md. 214, 219 (2004), *cert denied* ___ S.Ct. ___, 2006 WL 37262 (Jan. 9, 2006).

18 We adopt appellant's numbering, as it appears in his brief.

5. May a state court render a binding judicial decision based upon its interpretation of 49 U.S.C. 10501 (b), (which contains a provision for exclusive federal jurisdiction)? **No.**
6. Does the Commerce Clause of the U.S. Constitution prohibit State or local regulation of "instrumentalities of interstate commerce?" **Yes.**
7. Do the State and local statutes invoked in this case, by their necessary operation, directly and / or indirectly interfere with or burden interstate commerce? **Yes.**
8. Is there a beginning presumption against preemption when the State attempts to regulate "transportation by rail carrier" (an area where there has been a history of significant federal presence)? **No.**
9. Does 49 U.S.C. § 10501 (b) completely preempt all state and local regulation of rail carrier facilities? **Yes.**
   9 A. Preemption guidelines:
   9 B. ICCTA preemption:
   9 C. Complete Preemption guidelines:
   9 D. State Law as applied in this case, is completely preempted:
   9 E. Cases holding the ICCTA **completely** preempts State and local regulations:
   9 F. No preemption cases:
   9 G. Surface Transportation Board rulings:
10. Must railroad facilities be adjacent to a railroad's main line, or in the same state as a railroad's main line, in order to be 'instrumentalities of interstate commerce,' subject to the exclusive jurisdiction of the STB? **No.**
11. Does the ICCTA preempt local and State regulations requiring that permits be obtained prior to railroad-related construction activities? **Yes.**

**Injunction questions:**

12. May state or local officials be enjoined individually? **Yes.**
13. When State law is preempted, does the question of harm to the State, and the matter of the public interest, drop from a case involving injunctive relief against that preempted State law? **Yes.**

**Surface Transportation Board jurisdiction questions:**

14. Does a federal or state court have the authority to determine whether a facility is a railroad facility, or whether an entity is a rail carrier? **No.**

    14 A. The Surface Transportation Board has exclusive jurisdiction over transportation by rail carriers:

    14 B. Riffin is a Class III rail carrier subject to the exclusive jurisdiction of the STB:

    14 C. Who is a rail carrier and what constitutes a rail carrier facility, is to be determined exclusively by the STB:

    14 D. Riffin's two Maryland facilities are rail carrier facilities:

**Due process question:**

15 Should the permanent injunction be voided since it was not served on Riffin prior to it being signed by the court? **Yes.**

**Summary judgment question:**

16. Was summary judgment appropriate, since material facts were in dispute? **No.**

**Stream related questions:**

17. Does §9-304 of Maryland's Public Utility Companies Article grant a Maryland Railroad the right to cross or divert streams? **Yes.**

18. Does Maryland's common law grant a riparian land owner the right to repel unlawful waters? **Yes.**

    18 A. Maryland is a common law state:

    18 B. Riffin is a riparian land owner:

    18 C. Maryland's law regarding surface and stream waters:

    18 D. Maryland's case law regarding unlawful waters:

    a. Unlawful waters:

    b. Acts of God:

    c. Flood waters:

    18 E. "Waters of the State:"

    18 F. Riffin's levee:

19. Are the flood waters which inundate Riffin's Cockeysville facility, unlawful waters? **Yes.**

    19 A. Navigable waters:

    19 B. The outer limits of a river or stream is denoted by its

"high water mark" under "ordinary conditions:"

19 C. Percolating, Surface, Contained, Stream, Flood, and Unlawful Waters:

a. Percolating waters:
b. Surface waters:
c. Contained waters:
d. Stream waters:
e. Natural watercourse:
f. Flood waters:
g. Unlawful waters:

**Plaintiffs' Failure to State a Cause of Action and / or lack of Standing questions:**

20. a. The remedies granted by the circuit court are not authorized by the statutes:
b. Do the Plaintiffs lack standing? **Yes.**
c. Does the Plaintiffs' Complaint fail to state a cause of action? **Yes.**
d. Riffin's levee will not cause irreparable harm to the Plaintiffs:
e. The balance of hardships tips in favor of Riffin:
f. The public interest would be better served by allowing Riffin's levee to remain:

**Maryland law questions:**

21. Does §5-503 of Maryland's Environment Article require that a person obtain a permit prior to changing the cross section of a stream's *floodplain*? **No.**
22. Must a person notify the MDE Director prior to commencing construction activities encompassing less than one acre? **No.**

22 A. Riffin's grading activities fall within the auspices of MDE's General Permit for Construction Activity:

22 B. A "desire" to re-track 20 miles of railroad right-of-way, does not constitute "a common plan of development," when that desire is incapable of being realized:

23. If during numerous substantial rainfall events, soil placed adjacent to a stream does not in fact wash into the stream,

was that soil in a "location where it is likely to be washed into waters of the state?" **No.**

24. Is the penalty specified in §4-116(c) (3) of Maryland's Environment Article, to be based on the actual cost of compliance, or an estimate of that cost? **Actual cost.**

**Stockpiling sand, stone and gravel question:**

25. Does § 33-5-201 of the Baltimore County Code, grant a property owner the right to stockpile sand, stone and gravel, without first obtaining a permit? **Yes.**

| | | |
|---|---|---|
| MARYLAND DEPARTMENT | * | IN THE |
| OF THE ENVIRONMENT, *et al.* | * | CIRCUIT COURT |
| Plaintiffs | * | FOR BALTIMORE |
| v. | * | COUNTY |
| JAMES RIFFIN, *et. al.* | * | Case No. |
| Defendants | * | 03-C-04-008920 |

* * * * * * * * *

FILED: NOV 23 2004

**ORDER OF PERMANENT INJUNCTION**

Before the Court is the Motion to Dismiss filed by defendant James Riffin, which was converted to a motion for summary judgment by Judge John O. Hennegan in open court at the hearing on September 9, 2004; and the Motion to Dismiss Counterclaim and the Cross-Motion for Summary Judgment, filed by plaintiffs, the Maryland Department of the Environment and Baltimore County, Maryland.

The Court has read and reviewed the Complaint for Injunctive Relief and Civil Penalties, and the various and sundry papers filed herein, including the arguments and the grounds and authorities therefor set forth in defendant's Memorandum in Support of Motion to Dismiss, and in plaintiffs' Memorandum in Support of Motion to Dismiss Counterclaim and Cross-Motion for Summary Judgment, together with the exhibits attached thereto, and has heard and considered the arguments advanced in open court by the parties hereto. The Count notes with interest and considers persuasive the reasoning articulated in open court on the record by the Honorable Richard D. Bennett, as set forth on pages 55-59 of Transcript of Motions Hearing, Exhibit 2 to plaintiffs' Memorandum in Support of Motion to Dismiss Counterclaim and Cross-Motion for Summary Judgment.
**[pp. 55-59 of transcript reproduced at Appendix pp. 39 - 41]**

**NOW, THEREFORE**, in consideration of the above, the Court finds and holds that there exists no genuine dispute of material fact between the parties, and that plaintiffs are entitled to judgment as a matter of law. Wherefore, it is this 19th day of

November, 2004, by the Circuit Court for Baltimore County, **ORDERED AND ADJUDGED**

1. that defendant's Motion to Dismiss / Motion for Summary Judgment be, and it is hereby, **DENIED**;
2. that plaintiffs' Cross-Motion for Summary Judgment be, and it is hereby, **GRANTED**;
3. that plaintiffs' Motion to dismiss Counterclaim be, and it is hereby, **GRANTED**;
4. that Mr. James Riffin, his agents, servants, employees, representatives, and independent contractors, and all persons acting in behalf of or in concert with him be, and they are hereby, **permanently enjoined** to comply with all applicable provisions of State and local law, and specifically, Title 5, Subtitle 5 of the Environment Article of the Annotated Code of Maryland; Title 4, Subtitle 4 of the Environment Article of the Annotated Code of Maryland; Title 9, Subtitle 3 of the Environment Article of the Annotated Code of Maryland; Article 33, title 5 of the Baltimore County Code; and Title 4, Subtitle 1 of the Environment Article of the Annotated Code of Maryland;
5. that Mr. Riffin be, and he is hereby, **permanently enjoined** from conducting or performing any further earth-moving, construction, dumping, excavation, or grading activities at the properties located and known as 10919 York Road and 13 Beaver Run Lane, in Cockeysville, Baltimore County, Maryland ("the Site");
6. that Mr. Riffin be, and he is hereby, **permanently enjoined** to stabilize all exposed soils at the Site with seed and straw, and **permanently enjoined** to install all necessary sediment controls approved by Baltimore County;
7. that Mr. Riffin be, and he is hereby, **permanently enjoined** to relocate all equipment presently on or at the Site to an appropriate and legally authorized location other than a location within the boundaries of the Site;
8. that Mr. Riffin be, and he is hereby, **permanently enjoined** from interfering with the activities of the Maryland Department of the Environment or Baltimore County, or their agents, employees, officials, representatives, or contractors, to

remove and dispose of all stockpiled fill, ballast, and other stone or cement materials, including concrete railroad ties, from the Site and to store or dispose of said fill, ballast, and other stone or cement materials at appropriate and legally authorized locations pursuant to law;

9. that if Mr. Riffin wishes to conduct any earth-moving, construction, dumping, excavation, or grading activities at any time hereafter, he shall submit grading and sediment control plans to Baltimore County for its approval, and shall apply to the Maryland Department of the Environment for permits under §§ 5-503 and 9-323 of the Environment Article of the Annotated Code of Maryland;

10. that pursuant to section 4-417 of the Environment Article of the Annotated Code of Maryland, Mr. Riffin shall, within 30 days of the date of this Order, pay a civil penalty to the Maryland Department of the Environment in the amount of One Hundred Twenty-Five Thousand and 00/100 Dollars ($125,000.00), owing to his placement of soil and sediment in a location or condition likely to cause sediment pollution, in violation of section 4-413 of said Article;

11. that pursuant to section 9-342 of the Environment Article of the Annotated Code of Maryland, Mr. Riffin shall, within 30 days of the date of this Order, pay a civil penalty to the Maryland Department of the Environment in the amount of Fifty Thousand and 00/100 Dollars ($50,000.00) owing to his unpermitted discharge of sediment and other pollutants into the waters of the State, in violation of said Article;

12. that pursuant to sections 33-5-302(c) and (e) of the Baltimore County Code, Mr. Riffin shall, within 30 days of the date of this Order, pay a civil penalty to Baltimore County, Maryland, pursuant to the provisions Article 33, Title 5, section 33-5-302 of the Baltimore County Code, in the amount of One Hundred Sixty Thousand and 00/100 Dollars ($160,000.00), to permit the County and State install and maintain effective sediment controls and restore the Site to a stable condition; and

**[Note by judge:]** "Civil penalties are denied at this time."

13. that judgment be, and it is hereby, entered on behalf of the Maryland Department of the Environment and Baltimore County, Maryland.

/s/ Vicki Ballou-Watts 11/19/04
Judge, Circuit Court for Baltimore County

| | | |
|---|---|---|
| STATE OF MARYLAND | * | IN THE |
| DEPARTMENT OF THE | * | CIRCUIT COURT |
| ENVIRONMENT | * | FOR |
| 1800 Washington Blvd. | * | BALTIMORE |
| Baltimore, Maryland 21230 | * | COUNTY, |
| Plaintiff | * | MARYLAND |
| v. | * | |
| JAMES RIFFIN, *et. al.* | * | Case No. |
| Defendants | * | 03-C-03-013144 |

* * * * * * * * *

**ORDER**

Upon consideration of Defendants' Motions To Dismiss For Lack Of Jurisdiction, Not A Real Party In Interest and Failure To State A Cause of Action, the Maryland Department of the Environment's (MDE"S) Response thereto, and after oral argument, it is this 29th day of April, 2004

**ORDERED**:

James Riffin's Motion To Dismiss For Lack Of Jurisdiction is **DENIED**.

**AND IT IS FURTHERED ORDERED:**

James Riffin will give MDE full unimpeded access to the building located at 1941 Greenspring Drive, Timonium Maryland, for purposes of monitoring indoor air qualtiy.

**AND IT IS FURTHERED ORDERED:**

In the event that MDE determines that further remedial action of the site is necessary to address a potential hazard to the public and/or the environment, MDE shall notify this Court with the appropriate Motion for Access. This Court will retain jurisdiction over this matter.

FILED: MAY 03 2004

/s/ Robert E. Cadigan
Judge Robert E. Cadigan
Baltimore County Circuit Court

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MARYLAND**
**NORTHERN DIVISION**

| | | |
|---|---|---|
| **THE STATE OF MARYLAND acting for and on behalf of BALTIMORE COUNTY, MARYLAND,** | * | |
| **Plaintiff** | * | **CIVIL NO.** |
| **v.** | | |
| **JAMES L. RIFFIN,** | * | **RDB 04-2789** |
| **Defendant** | | |

* * * * * * * * *

**ORDER**

For the reasons stated in the foregoing memorandum Opinion, it is this 17th day of September 2004, by the Court, ORDERED that:

1. This action be DISMISSED for lack of subject-matter jurisdiction, pursuant to Federal Rule of Civil Procedure 12(h)(3);
2. Plaintiff's Motion Remand of the case to the District Court for Baltimore County is rendered MOOT;
3. The Clerk of this Court shall close this case and transmit copies of this Order and accompanying Memorandum Opinion to all parties.

/s/ Richard D. Bennett
Richard D. Bennett
United States District Judge

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MARYLAND**
**NORTHERN DIVISION**

| | | |
|---|---|---|
| **THE STATE OF MARYLAND acting for and on behalf of BALTIMORE COUNTY, MARYLAND,** | * | |
| **Plaintiff** | * | **CIVIL NO.** |
| **v.** | | |
| **JAMES L. RIFFIN,** | * | **RDB 04-2789** |
| **Defendant** | | |

* * * * * * * * *

## MEMORANDUM OPINION

Before the Court is Defendant [*sic*] Baltimore County, Maryland's Motion to Remand the instant action to the Baltimore County District Court. Defendant Riffin is the operator of The Northern Central Railroad, which is operating in Pennsylvania and maintaining railroad storage facilities in Baltimore County, Maryland. The County brought suit against Riffin for violations of the Baltimore County Fire Prevention Code that were due to the alleged inadequacy of underground storage tanks. A trial on the merits was held by the Honorable Robert E. Cahill, Jr. on August 25, 2004. Judge Cahill found Defendant Riffin in violation of the Baltimore County Fire Code. On August 27, 2004, Defendant removed the action to this Court solely on the theory that the fire regulations are completely preempted by the Interstate Commerce Commisssion Termination Act ("ICCTA"), 49 U.S.C. §10501(b). Defendant argues that the state court judgment was in error in light of what he contends is the exclusive jurisdiction of the federal courts over the regulations at issue.

Defendant Riffin removed two other state-court actions based on the precise preemption arguments raised in Defendant's Notice of Removal in the instant action. The Maryland

Department of the Environment and Baltimore County brought suit against Mr. Riffin in Baltimore County Circuit Court for violations of state and local environmental regulations. Defendant Riffin removed those actions to this Court, which were styled, Civil Actions RDB-04-1342 and RDB-04-2828. As in this case, Mr. Riffin argued that the state and local environmental regulations were completely preempted by ICCTA. On September 8, 2004, this Court conducted an expedited hearing solely on the question of whether this Court had jurisdiction over the claims based on complete preemption. After hearing extensive argument, the Court determined that ICCTA does not completely preempt the state and local environmental regulations on which the lawsuits were based, and that this Court therefore lacked subject-matter jurisdiction over both cases. Accordingly, this Court remanded both cases to the Circuit Court for Baltimore County by Orders dated September 8, 2004. Those cases involved nearly identical issues as those presented here.

The threshold question presented by plaintiff's Motion to Remand is whether this court has exclusive subject-matter jurisdiction over the local ordinances forming the basis of Plaintiff's lawsuit. This Court may assert federal removal jurisdiction over Plaintiff's state-law claims only if the Court determines that the ICCTA completely preempts the state and local environmental regulations that form the basis for Plaintiffs' action. *See Franchise Tax Board of the State of California v. Construction Laborers Vacation Trust for So. Calif.*, 463 U.S. 1, 9-10 (1983) (recognizing that, under the well-pleaded complaint rule, ordinary preemption does not give rise to removal jurisdiction over state-law claims); *Rivet v. Regions Bank of Louisiana*, 522 U.S. 470, 475 (1998) (federal courts obtain federal removal jurisdiction where "federal law completely preempts a plaintiff's state-law claim.") Ordinary preemption of state laws is merely a "federal defense" to the state-law action to be considered by the state courts. *Franchise Tax Bd. of Cal.*, 463 U.S. 1, 14 (1983). (recognizing that "a case

may not be removed to federal court on the basis of a federal defense, ... Even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense is the only question truly at issue in the case.") ordinary preemption does not confer federal removal jurisdiction over state-law claims. *Id.*

In light of these principles, the precise question is whether the local fire ordinances forming the basis of the County's state lawsuit is completely preempted by the ICCTA. That question turns on whether the local fire regulations conflict with the clear congressional intent to exclusively regulate railroads. *Aetna Health, Inc. v. Davila,* 124 S.Ct. 2488, 2495, ___ U.S. ___ (2004). No such conflict exists here. The United States Court of Appeals for the First Circuit recognized that local regulations of railroads[1] are preempted by ICCTA only when the regulations "unduly restrict the railroad from conducting its operations, or unreasonably burden interstate commerce." *Boston and Maine Corp. v. Town of Ayer,* 330 F.3d 12, 17 (1st Cir. 2003). Moreover, the federal body charged with carrying out the railroad regulation regime has recognized that "court and agency precedent addressing the scope of [ICCTA] have made it clear that ... not all state and local regulations that affect railroads are prohibited under this broad preemption regime." *Idaho Northern & Pacific Railroad Co.,* STB Docket No. AB-433X, 2001 WL 1586967, at *4 (2001). Likewise, other courts have recognized that local safety regulations that are not targeted specifically at railroads do not conflict with the broad federal regulation of railroad regime, and are thus not even prreempted under the doctrine of ordinary preemption. *See Florida East Coast Ry. Co. v. City of West Palm Beach,* 266 F.3d 1324, 1329 (11th Cir. 2001) (holding that local zoning regulation not preempted by

---

1 Although there is some dispute as to whether Riffin qualifies as a "railroad" under the ICCTA, the Court will assume that he is for the sake of argument.

§10501(b) because "the alleged encroachment upon federal jurisdiction here does not occur by the municipality's legislating in a field of historic federal presence, but through the exercise of its inherently local powers."; *Village of Ridgefield Park v. New York, Susquehanna & Western Ry. Corp.*, 163 N.J. 446, 461, 750 A.2d 57, 66 (2000) ("We envision that it will be the rare situation when fairly enforced fire, health, plumbing, safety, or construction regulations interfere with a railroad's operations."). The authorities therefore suggest that local fire regulations, such as those at issue here, are [*sic*] do not conflict with Congress' intent to exclusively regulate railroads and are therefore not completely preempted by the ICCTA. Accordingly, this Court lacks subject-matter jurisdiction over the state-court claims.

Moreover, this Court may not review the merits of the state court's final judgment. Under the jurisdictional *Rooker-Feldman* doctrine, "a party losing in state court is barred from seeking what in substance would be an appellate review of the state judgment in a United States District Court ... ." *Johnson v. DeGrandy*, 512 U.S. 997, 1005-1006 (1994); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983) (noting that federal district courts have no authority to "entertain a proceeding to reverse or modify" a state court judgment); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923) (noting exclusive jurisdiction over review of state court action is in the Supreme Court of the United States); *Shooting Point, L.L.C. v. Cumming*, 368 F.3d 379, 383 (4th Cir. 2004) (applying *Rooker-Feldman* to recognize that "lower federal courts generally do not have subject-matter jurisdiction to review state court decisions"); *see also* Erwin Chemerinsky, *Federal Jurisdiction* 465-66 (4th ed. 2003) (describing the *Rooker-Feldman* doctrine). Likewise, this Court is required to recognize that, under the doctrine of *res judicata*, issues decided in state court may not be re-litigated in subsequent proceedings. *Allen v. McCurry*, 449 U.S. 90,96 (U.S. 1980). The claims presented in Defendant Riffin's Notice of Removal are identical to those that were asserted, and ruled upon, in the state court proceedings. Consequently, this Court

will DISMISS the instant action without remanding the case to the Baltimore County District Court. *See* Federal Rule of Civil Procedure 12(h)(3) ("Whenever it appears by suggestion of the parties *or otherwise* that the court lacks jurisdiction of the subject matter, *the court shall dismiss the action.*"); *Allen*, 449 U.S. at 95 (lower federal courts must recognize final judgments of state courts under *res judicata*). A separate Order will be entered accordingly.

September 17, 2004

/s/ Richard D. Bennett
Richard D. Bennett
United States District Judge

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MARYLAND**
**NORTHERN DIVISION**

| | | |
|---|---|---|
| **JAMES RIFFIN** | * | |
| **Plaintiff** | | **CIVIL NO.** |
| | * | |
| **ADAM D. SNYDER, *et. al.*,** | | **RDB 04-2964** |
| **Defendants** | | |

* * * * * * * * *

**ORDER**

For the reasons stated in the foregoing memorandum Opinion, it is this 16th day of September 2004, by the Court, ORDERED that:

1. This action be DISMISSED for lack of subject-matter jurisdiction, pursuant to Federal Rule of Civil Procedure 12(h)(3);
2. Plaintiff's Motion for Preliminary Injunction and Temporary Restraining Order is rendered MOOT;
3. The Clerk of this Court shall close this case and transmit copies of this Order and accompanying Memorandum Opinion to all parties.

/s/ Richard D. Bennett
Richard D. Bennett
United States District Judge

| | | |
|---|---|---|
| **Maryland Department of the Environment, *et. al.*** | * | **UNITED STATES DISTRICT COURT** |
| **Plaintiffs,** | * | **DISTRICT OF MARYLAND** |
| **v.** | | |
| **James Riffin, *et. al.*** | * | **NORTHERN DIVISION** |
| **Defendants** | | **Civil No. RDB-04-2848** |

* * * * * * * * *

**Excerpts from the transcript** of the September 8, 2004 motions hearing before the Honorable Richard D. Bennett, Judge.

**Beginning at Page 55:** THE COURT: Okay. All right. Thank you, gentlemen. This Court granted a rather speedy hearing in this particular case in light of the fact that the lawsuit in this case was filed on August the 30th, just last, essentially within the last ten days. The lawsuit was filed on August the 30th. The plaintiffs brought suit against the defendants, James Riffin, and his contractor, the Six M Company. There was a removal to this court on September the 3rd. The Baltimore County Circuit Court on August the 30th issued a temporary restraining order and scheduled a hearing for a preliminary injunction tomorrow, September 9. The ten-day temporary restraining order issued by Baltimore County, the Circuit Court for Baltimore County was scheduled to expire tomorrow, September the 9th at 4:00 p.m. Soon after filing the complaint, plaintiffs learned that the defendants were dumping construction and demolition debris at the construction site at issue. Essentially, then the plaintiffs filed a Motion to Remand this case to the Circuit Court of Baltimore County arguing that in the event that there was not a remand, that that temporary restraining order would essentially expire tomorrow afternoon. Accordingly, this Court immediately scheduled a hearing on the motion to Remand. The Court would note that literally almost the identical issues are still pending before this Court in another case, the State of Maryland v. James Riffin, Civil Number RDB-04-Civil-1342. **[56]**

The basis of the defendant's removal petition is that his business is a railroad and that he is therefore entitled to the protection of the Interstate Commerce Commission Termination Act, ICCTA, which he claims completely preempts all of the

plaintiffs' state law claims and efforts at environmental regulations. The defendant, Riffin, has candidly acknowledged that in his view there can be no enforcement of state or local environmental laws because all such laws would be preempted by his argument that his business is a railroad and all such regulations would be preempted by the ICCTA. As a companion to the Motion to Remand filed by the plaintiffs, Maryland Department of the Environment and Baltimore County, the co-defendants in this case, the Six M Company, the co-defendant, Six M Company, has filed a motion today literally minutes before I took the bench, a Motion to Remand for Failure to Obtain Proper Consent, noting failure of the defendant, James Riffin, to comply with the requirements of 28 United States Code Section 1446. Mr. Riffin's response as to that is that there is complete preemption of the entire question by the ICCTA. Therefore, any lack of compliance with the requirements of Section 1446 are of no moment. The Court, first of all, finds that it is questionable whether or not Mr. Riffin would qualify as a railroad or a railway with respect to his operations in Maryland. But for the sake of argument, the Court will make a finding that even if Mr. Riffin is deemed to be a rail carrier in light of the, some authority he's been given by **[57]** the Surface Transportation Board to operate a rail line in Pennsylvania, albeit not in Maryland, that even if he is a rail carrier and for the sake of argument, the Court will assume he is a rail carrier, there is simply not complete preemption in this case. Accordingly, on that basis alone, there is not complete preemption in this case. The defendant, Six M Company, has aptly noted a failure to comply with the requirements of 28 United States Code, Section 1446 in Mr. Riffin's notice of removal. Furthermore, because there is a requirement of complete preemption, the Court notes that consideration of preemption under the supremacy clause starts with the basic assumption that Congress does not intend to displace state law. The Court would not [*sic*] that principles of federalism dictate to this court that in the absence of clarity of intent, Congress cannot be deemed to have significantly changed the federal state balance. If a federal statute's terms can be read

sensibly not to have a preemptive effect, the presumption against preemption controls and no preemption may be inferred. Those principles of federalism compel this court to find that the applicable statute in question, the Interstate Commerce Collision [*sic*] Termination Action, [*sic*] can be read sensibly not to have a preemptive effect and this is consistent with other cases which rule in favor of the matter of a presumption against preemption. A presumption, which the defendant, Riffin, has failed to overcome in this case. The Supreme court in the Metrodonna case, at 518 U.S. and **[58]** particularly at page 485 noted these very principles of federalism. The First Circuit in Boston and Maine Corporation v. Town of Air [*sic*] noted that local regulations of railroads are not preempted by the ICCTA when the laws are deemed to be reasonable and nondiscriminatory environmental restrictions, which do not unduly burden interstate commerce or unduly restrict the railroad from conducting its operations. I don't find that the application of these provisions unduly restrict this railroad, assuming we call Mr. Riffin a railroad and for purposes of this opinion, I'm granting him that he may be a railway, although I'm not making that finding, from conducting his operations. These types of regulations are not intended by Congress to be completely preempted by ICCTA and applying those principles of federalism across the board in this case the Motion to Remand filed by the Maryland Department of Environment and Baltimore County is granted. The Motion to Remand for Failure to Obtain proper Consent of the Defendant, Six M Company, is granted. Accordingly, this Court will issue an order granting those Motions to Remand and issue an order remanding this case back to the Circuit court for Baltimore County. The Court would note that the counsel have indicated that the identical issues apply in the case of State of Maryland v. James Riffin in Civil Number RDB-04-1342, a civil case. Baltimore County is not a party in that case, but the same principles apply. Accordingly, for reasons stated on the record in this case, the Motion to Remand **[59]** of the State of Maryland in that case is granted and an order shall be issued remanding that case back to the Circuit Court.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
April 19, 2005

No. 04-2227
CA-04-2964-RDB

JAMES RIFFIN
Plaintiff – Appellant

v.

ADAM D. SNYDER; MICHAEL V. FORLINI;
C. ROBERT LOSKOT; PAUL M. MAYHEW
Defendants – Appellees

---

On Petition for Rehearing and Rehearing En Banc

---

Appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel composed of Judge Wilkinson, Judge Michael, and Judge Sheed.

For the Court,

/s/ Patricia S. Connor

**UNPUBLISHED**

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

---

No. 04-2227

---

JAMES RIFFIN

Plaintiff – Appellant

versus

ADAM D. SNYDER; MICHAEL V. FORLINI; C. ROBERT LOSKOT; PAUL M. MAYHEW

Defendants – Appellees

---

Appeal from the United States District Court for the District of Maryland, at Baltimore. Richard D. Bennett, District Judge. (CA-04-2964-RDB)

---

Submitted: February 9, 2005 Decided: February 14, 2005

---

Before WILKINSON, MICHAEL, and SHEED, Circuit Judges.

---

Affirmed by unpublished per curiam opinion.

---

James Riffin Appellant Pro Se. Mary Rosewin Sweeney, OFFICE OF THE ATTORNEY GENERAL OF MARYLAND, Baltimore, Maryland; John Edward Beverungen, COUNTY ATTORNEY'S OFFICE, Towson, Maryland, for Appellees.

---

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36 (c).

PER CURIAM:

James Riffin appeals the district court's order dismissing his civil action for lack of subject matter jurisdiction. We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. *See Riffin v. Snyder*, No. CA-04-2964-RDB (D. Md. Sept. 17, 2004). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

## VERBATIM TEXT OF STATUTES INVOLVED

**U.S. Constitution, Article I, §8, Cl.3 (Commerce Clause):**

"To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;"

**U.S. Constitution, Article III, §2 [1]:**

"[1] The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;"

**U.S. Constitution, 5th Amendment:**

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

**U.S. Constitution, 14th Amendment, Section 1:**

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

**49 U.S.C. §§ 10101 - 11908:**

ICCTA, 49 U.S.C.A., Subtitle IV, Part A, Chapters 101, 105, 107, 109, 111, 113, 115, 117 and 119. Congress delineated the provisions relevant to the regulation of railroads and rail transportation services. Chapter 101 sets forth rail transportation policy and the definitions used throughout the statutory scheme. 49 U.S.C.A. §10101 and 10102. Chapter 105 sets forth the general jurisdiction of the Board and provides for its authority to exempt rail carrier transportation. 49 U.S.C.A. §10501 and 10502. Chapter 107 deals exhaustively with the setting of rates, the general authority therefor, special circumstances applying thereto, and limitations thereon. 49 U.S.C.A. §10701 through 10709; 10721 - 10722; and 10741 through 10747. Chapter 109 deals with licensing, authorizing the construction and operation of railroad lines, short line purchases by Class II and Class III rail carriers, abandonment and discontinuation of lines and service, offers of financial assistance, sale of abandoned rail properties, exceptions to the Board's authority, and railroad development. 49 U.S.C.A. §§ 10901 through 10907. Chapter 111 deals with operations, setting forth general requirements for operations, car service regulations, reports and records, and railroad cost accounting. 49 U.S.C.A. §§11101 through 11103; 11121 through 11124; 11141 through 11145; and 11161 through 11164. Chapter 113 deals with finance, specifically, with equipment trusts, security interests, and combinations. 49 U.S.C.A. §§ 11301, and 11321 through 11328. Chapter 115 deals with Federal-State Relations, namely, taxes and tax discrimination. 49 U.S.C.A. §§11501 - 11502. Chapter 117 deals with enforcement, specifically, the rights and remedies of persons injured by rail carriers; limitation on actions by and against rail carriers; liability of rail carriers under receipts and bills of lading; and liability when property is delivered in violation of routing instructions. 49 U.S.C.A. §§11701 through 11707. Finally, chapter 119 deals with civil and criminal penalties for violations of the statutory scheme and for engaging in combinations in restraint of trade. 49 U.S.C.A. §§11901 through 11908.

**49 U.S.C. § 10901:**

"(a) A person may –

(4) in the case of a person other than a rail carrier, acquire a railroad line or acquire or operate an extended or additional railroad line, only if the Board issues a certificate authorizing such activity under subsection (c).

(c) The Board shall issue a certificate authorizing activities for which such authority is requested in an application filed under subsection (b) unless the Board finds that such activities are inconsistent with the public convenience and necessity."

**49 CFR: "Subpart A – Applications Under 49 U.S.C. 10901.**

**§1050.1 Introduction**

(a) *When an application is required.* This subpart governs applications under 49 U.S.C. 10901 for a certificate of public convenience and necessity, authorizing the construction, acquisition or operation of railroad lines. Noncarriers require Board approval under section 10901 to construct, acquire or operate a rail line in interstate commerce. Existing carriers require approval under section 10901 only to construct a new rail line or operate a line owned by a noncarrier, since acquisition by a carrier of an active rail line owned by a carrier is covered by 49 U.S.C. 11343. We have exempted from these requirements the acquisition by a State entity of a rail line that has been approved for abandonment, as well as operations over these lines. See subpart C of this part. In addition, where appropriate, we have granted individual exemptions from these certification requirements. See 49 U.S.C. 1050[2]."

"**Subpart D Exempt Transactions Under 49 U.S.C. 10901.**

**§ 1150.31 Scope of exemption.**

(a) Except as indicate below, this exemption applies to all

acquisitions and operations under section 10901 (See 1150.1, *supra*).

**§ 1150.32 Procedures and relevant dates – transactions that involve creation of Class III carriers.**

(a) To qualify for this exemption, applicant must file a verified notice providing details about the transaction, and a brief caption summary, conforming to the format in §1150.34, for publication in the Federal Register.

(b) The exemption will be effective 7 days after the notice is filed.

**§ 1150.33 Information to be contained in notice – transactions that involve creation of Class III Carriers.**

(a) The full name and address of the applicant.

(b) The name, address, and telephone number of the representative of the applicant who should receive correspondence;

(c) A statement that an agreement has been reached or details about when an agreement will be reached;

(d) The operator of the property;

(e) A brief summary of the proposed transaction . . .

(f) A map that clearly indicates the area to be served, including origins, termini, stations, cities, counties, and States; and

(g) A certificate that applicant's projected revenues do not exceed those that would qualify it as a Class III carrier."

**Maryland Constitution:**

**Art. 5.** "That the inhabitants of Maryland are entitled to the Common Law of England, and the trial by Jury, according to the course of that law, and to the benefit of such of the English statutes as existed on the Fourth day of July, 1776; and which, by experience, have been found applicable to their local and other circumstances, and have been introduced, used and practiced by

the Courts of Law or Equity; and also of all Acts of Assembly in force on the first day of June, 1867; except such as may have since expired, or may be inconsistent with the provisions of this Constitution; subject, nevertheless, to the revision of, and amendment or repeal by, the Legislature of this State. And the Inhabitants of Maryland are also entitled to all property derived to them from or under the Charter granted by His majesty, Charles the First to Caecilius Calvert, Baron of Baltimore."

**Maryland Environment Article ("EA"):**

**EA § 4-101.1:**

(a) *In general.* – In this title [Title 4, Water Management] the following words have the meanings indicated.

(d) *Waters of this State.* – "Waters of this State" includes:

(1) Both surface and underground waters within the boundaries of this State subject to its jurisdiction, including that part of the Atlantic ocean within the boundaries of this State, the Chesapeake Bay and its tributaries, and all ponds, lakes, rivers, streams, storm drain systems, public ditches, tax ditches, and public drainage systems within this State, other than those designed and used to collect, convey, or dispose of sanitary sewage; and

(2) The flood plain of free-flowing waters determined by the Department of Natural Resources on the basis of the 100-year flood frequency.

**EA §4-105. Construction – In general.**

(a) *Definition; review and approval; sediment control plan.* –

(1) (i) In this section "construction" means land clearing, grubbing, topsoil stripping, soil movement, grading, cutting and filling, transporting, or otherwise disturbing land for any purpose.

(ii) "Construction" includes land disturbing activities for the purpose of:

1. Constructing buildings;
2. Mining minerals;

3. Developing golf courses; and
4. Constructing roads and installing utilities.

(2) (i) Before any person begins any construction, the appropriate approval authority shall first receive, review, and approve the proposed earth change and the sediment control plan.

(ii) Except as provided in subsection (b) of this section, the approval authority is:

1. The appropriate soil conservation district;
2. Any municipality not within a soil conservation district;
3. If a State or federal unit undertakes any construction, the Department; or
4. For abandoned mine reclamation projects conducted by the Department of Natural Resources pursuant to Title 15, Subtitles 5, 6, and 11 of this article, the Department of Natural Resources.

(iii) Criteria used by the Department of Natural Resources for review and approvals under subparagraph (ii) 4 of this paragraph:

1. Shall meet or exceed current Maryland standards and specifications for soil erosion and sediment control; or
2. If alternative standards are applied, shall be reviewed and approved by the Department.

(3) A person may not begin or perform any construction unless the person:

(i) Obtains an approved sediment control plan;

(ii) Implements the measures contained in the approved sediment control plan;

(ii) Conducts the construction as specified in the sequence of construction contained in the approved sediment control plan;

(iv) Maintains the provisions of the approved sediment control plan; and

(v) Implements any sediment control measures reasonably necessary to control sediment runoff.

(4) In consultation with the person responsible for performing the construction, the Department, jurisdictions

delegated enforcement authority under §4-103(3)(2) of this subtitle, or the appropriate approval agency may require modifications to an approved sediment control plan if the approved plan is not adequate to control sediment or erosion.

(5) A person performing construction that proposes a major change to an approved sediment control plan shall submit the proposed change to the appropriate approval authority for review and approval.

**EA § 4-116. Violations and penalties; injunctive relief; civil liability; enforcement.**

(a) *Violations and criminal penalties.* – Any person who violates any provision of this subtitle is guilty of a misdemeanor, and upon conviction in a court of competent jurisdiction is subject to a fine not exceeding $5,000 or imprisonment not exceeding one year or both for each violation with costs imposed in the discretion of the court. Each day upon which the violation occurs constitutes a separate offence.

(b) *Injunctions.* Any agency whose approval is required under this subtitle or any interested person may seek an injunction against any person who violates or threatens to violate any provision of this subtitle.

(c) *Civil penalties.* – (1) In addition to any other sanction under this subtitle, a person is liable for a civil penalty as provided in this subsection if the person:

(i) Clears, grades, transports, or otherwise disturbs land without first installing erosion and sediment controls in accordance with an approved plan;

(ii) Fails to establish erosion and sediment controls in accordance with an approved plan within the time specified by a State, county, or municipal order or to maintain those erosion and sediment controls.

(2) The appropriate county, municipal, or State agency may recover a civil penalty under paragraph (1) of this subsection in a civil action in an amount equal to double the cost of:

(i) The installation of erosion and sediment controls in accordance with an approved plan;

(ii) Maintaining erosion and sediment controls in accordance with an approved plan; and

(iii) The permanent restoration of the disturbed land to a stable condition.

(3) The appropriate county, municipal, or State agency may recover a civil penalty under paragraph (1) of this subsection on proof of costs as specified in paragraph (2) of this subsection, without the necessity of proving that the agency performed work or incurred expenses. However, if any person responsible has made the required corrections within the time specified by a State, county, or municipal order, the appropriate State, county, or municipal agency may recover a civil penalty under this subsection in an amount equal to not more than 50 percent of the costs specified in paragraph (2) of this subsection."

**EA § 4-413 (a). Adding, introducing, etc., soil or sediment into waters of the State.**

(a) *In general.* – Except as provided in subsection (b) of this section, or except as authorized by a permit issued under § 9-323 of this article, it is unlawful for any person to add, introduce, leak, spill, or otherwise emit soil or sediment into waters of the State or to place soil or sediment in a condition or location where it is likely to be washed into waters of the State by runoff of precipitation or by any other flowing waters.

(b) *Agricultural land management practices.* – A person engaged in agricultural land management practices, ... .

**EA § 5-101. Definitions.**

(a) *In general.* In this title [Title 5, Water Resources] the following words have the meanings indicated.

(j) *Water of the State.* – "Waters of the State" includes:

(1) Both surface and underground waters within the boundaries of the State subject to its jurisdiction;

(2) That portion of the Atlantic Ocean within the boundaries of the State;

(3) The Chesapeake Bay and its tributaries;

(4) All ponds, lakes, rivers, streams, public ditches, tax ditches, and public drainage systems within the State, other than those designed and used to collect, convey, or dispose of sanitary sewage; and

(5) The floodplain of free-flowing waters determined by the Department on the basis of the 100-year flood frequency.

**EA § 5-502. Permit to appropriate or use State waters.**

(a) *Required.* – Every person is required to obtain a permit from the Department to appropriate or use or begin to construct any plant, building, or structure which may appropriate or use any waters of the State, whether surface water or groundwater. The permit is obtained upon written application tot he Department. The applicant shall provide the Department with satisfactory proof that the proposed withdrawal of water will not jeopardize the State's natural resources.

**EA § 5-503. Permit to construct or repair reservoirs, dams, or waterway obstructions.**

(a) *Required.* – (1) A person shall obtain a permit from the Department to construct, reconstruct, or repair any reservoir, dam or **waterway** obstruction, to make, construct, or permit to be made or constructed any change or addition to any reservoir, dam, or **waterway** obstruction, to make or permit to be made any change in, addition to, or repair of any existing **waterway** obstruction of any **stream or body of water** within the State, except tidal waters. The permit is obtained upon written application to the Department. (Emphasis added.)

**EA §5-512. Application and construction of subtitle.**

(a) *In general.* – The provisions of this subtitle **do not amend or repeal**:

(1) **Any law relating** to the Public Service Commission or **to water** and water structures; or

(2) Any act or parts of acts consistent with the provisions of this subtitle.

(b) Rights granted to Mayor and City Council of Baltimore. **The provisions of this subtitle do not impair any riparian or other vested right,** nor amend, repeal, limit, impair, or alter any right, power, or privilege granted by the General Assembly to the Mayor and City Council of Baltimore to appropriate or use any river, stream, or water in the State to augment and improve the municipal water supply of Baltimore City. (Emphasis added.)

**EA § 5-513. Enforcement of subtitle by injunction.**

"On application of the Department, verified by oath or affirmation, the circuit court for any county, sitting in equity, may enforce by injunction, compliance with, or restraint from violating or attempting to violate any provisions of the subtitle or any Department order, notice, or regulation made under this subtitle."

**EA § 9-101. Definitions.**

(a) *In general.* – In this title [Title 9. Water, Ice, and Sanitary Facilities.] the following words have the meanings indicated.

(g) *Pollutant.* – "Pollutant" means:

(1) Any waste or wastewater that is discharged from:

(i) A publicly owned treatment works; or

(ii) An industrial source; or

(2) Any other liquid, gaseous, solid, or other substance that will pollute any waters of this State.

(h) *Pollution.* – "Pollution" means any contamination or other alteration of the physical, chemical, or biological properties of any waters of this State, including a change in temperature, taste, color, turbidity, or odors of the waters or the discharge or deposit of any organic matter, harmful organism, or liquid, gaseous, solid, radioactive, or other substance into any waters of this State, that will render the waters harmful or detrimental to:

(1) Public health, safety, or welfare;

(2) Domestic, commercial, industrial, agricultural,

recreational, or other legitimate beneficial uses;
(3) Livestock, wild animals, or birds; or
(4) Fish or other aquatic life.

**EA §9-303. Construction.**

This subtitle [Subtitle 3. Water Pollution Control.] **does not take away the right of any person, as a riparian owner or otherwise, in equity, at common law, or under statutory law to suppress a nuisance or abate pollution.** (Emphasis added.)

**EA § 9-322. Discharge of pollutants prohibited; exceptions.**

Except as provided in this subtitle [Part IV. Discharge Permits.] and Subtitle 4 of Title 4 of this article and the rules and regulations adopted under those subtitles, a person may not discharge any pollutant into the waters of this State.

**EA §9-323. Discharge permit required.**

(a) *In general.* – A person shall hold a discharge permit issued by the Department before the person may construct, install, modify, extend, alter, or operate any of the following **if its operation could cause or increase the discharge of pollutants** into the waters of this State: (Emphasis added.)

(1) An industrial, commercial, or recreational facility or disposal system.
(2) A State-owned treatment facility.
(3) Any other outlet or establishment.

**EA § 9-325. Rules and regulations relating to discharge permits.**

(a) *In general.* – The Department may adopt rules and regulations that relate to application for, issuance of, revocation of, or modification of discharge permits. The rules and regulations may require submission of plans, specifications, and other information.

(b) *Application fee.* The rules and regulations adopted

under this section shall set a reasonable application fee in an amount de[illegible]ed to cover the cost of the permit procedure.

(c) *Per[illegible] fee schedule.* – (1) The rules and regulations adopted under this section shall set a reasonable permit fee schedule for industrial users based on:

(i) The anticipated cost of monitoring and regulating the permitted facility;

(ii) The flow of effluent discharge from the permitted facility; and

(iii) the anticipated needs for program development activities that relate to management of the discharge of pollutants into the waters of this State.

(2)In adopting the rules and regulations under this subsection, the Department shall consult with industry and provide that the permit fee not exceed a certain dollar amount.

**EA § 9-339. Injunctive relief.**

(a) *In general.* – The Department may bring an action for an injunction against any person who violates any provision of this subtitle or any rule, regulation, order, or permit adopted or issued by the Department under this subtitle.

(b) *Department findings.* – In any action for an injunction under this section, any finding of the Department after a hearing is prima facie evidence of each fact the Department determines.

(c) *Grounds.* – On a showing that any person is violating or is about to violate this subtitle or any rule, regulation, order, or permit adopted or issued by the Department, the court shall grant an injunction without requiring a showing of a lack of an adequate remedy at law.

(d) *Emergency.* – If an emergency arises from imminent danger to the public health, to the public welfare, or to the environment, the Department may sue for an immediate injunction to stop any pollution or other activity that is causing the danger.

**EA § 9-342. Civil penalties.**

(a) *Civil action.* – In addition to being subject to an

injunctive action under this subtitle, a person who violates any provision of this subtitle or of any rule, regulation, order, or permit adopted or issued under this subtitle is liable to a civil penalty not exceeding $10,000, to be collected in a civil action brought by the Department. Each day a violation occurs is a separate violation under this subsection.

**Maryland Public Utility Companies Article ("MPUCA"):**

**MPUCA § 1-101. Definitions.**

(a) *In general.* In this article the following words have the meanings indicated.

(c) *Common carrier.* (1) "Common carrier" means a person, public authority, or federal, State, district, or municipal transportation unit that is engaged in the public transportation of persons for hire, by land, water, air, or any combination of them.

(2) "Common carrier" includes:

(iv) a railroad company, street railroad company, sleeping car company;

(d) *Company.* "Company", as a designation for a type of enterprise, includes a person that owns a company individually or as an agent, trustee, or receiver of a company.

(m) *Person.* "Person" means an individual, receiver, trustee, guardian, personal representative, fiduciary, or representative of any kind and any partnership, firm, association, corporation, or other entity.

(q) *Railroad.* (1) "Railroad" means a common carrier by rail powered in any manner.

(2) "Railroad" includes material, equipment, and property used on or in connection with a railroad.

**MPUCA §5-407. Same - Public way.**

(a) *Agreement with owner.* -- A railroad company and the municipal corporation, public officer, or public authority that owns or has control of any road, street, alley, or other public way or ground necessary to locate any part of the railroad may agree

on the manner, terms, and conditions allowing the railroad company to use or occupy the road, street, alley, or other public way or ground.

(b) *Action for condemnation.* If the parties are unable to agree and the railroad company needs to use or occupy the road, street, alley, or other public way or ground, the railroad company may acquire the property by condemnation in accordance with Title 12 of the Real property Article."

**MPUCA § 9-301. "Maryland railroad company" defined.**

In this subtitle, "Maryland railroad company" means a railroad company organized under the laws of this State.

**MPUCA § 9-304. Crossing – Streams.**

(a) *Power to cross or divert streams.* – (1) A Maryland railroad company may cross or divert an unnavigable stream whenever it is necessary to construct a railroad.

(2) A Maryland railroad company that diverts a stream is liable for damage caused by the diversion.

(b) *Crossing navigable streams or canals; approval by Board of Public Works.* – A Maryland railroad company may cross a canal or a navigable stream if the company:

(1) submits to the Board of Public Works a plan for the canal or stream crossing that includes the location and building plans of the bridge and other necessary fixtures; and

(2) receives written approval from the Board of Public Works.

(c) *Circuit court review.* – (1) If the Board of Public Works disapproves a plan submitted by a Maryland railroad company or fails to approve the plan within 20 days after filing, the Maryland railroad company may apply to the circuit court of the county where the canal or stream crossing is planned or to another court of competent jurisdiction.

(2) the court shall:

(i) provide reasonable notice to the Board of Public Works;

(ii) for good cause shown, appoint a disinterested and competent engineer, who does not reside in a county through which the Maryland railroad company's railroad passes and who, within 20 days of being appointed:

1. shall examine the canal or stream crossing; and

2. shall establish a plan and any conditions necessary to cross the canal or stream in a way that will not impede navigation; and

(iii) examine the engineer's plan and conditions for the canal or stream crossing, and unless good cause is shown, approve the plan and conditions.

(3) An order by the court approving the plan and conditions for the canal or stream crossing shall be sufficient authority for the Maryland railroad company to elect, use, and occupy the bridge.

**MPUCA §9-307. Abandonment by unfinished railroad.**

If the right-of-way or location of any part of an unfinished railroad remains unused for railroad purposes for 10 years or longer, the right-of-way or location is deemed abandoned and may be purchased or condemned by a railroad company under Title 5, Subtitle 4 of this article and Title 12 of the Real Property Article."

**Baltimore County Code ("BCC"):**

**BCC § 32-4-414. FLOODPLAIN AND WETLAND PROTECTION.**

(a) *Definitions.* In this section, "base flood","development", "flood insurance rate map", "flooding", "floodway" and "riverine floodplain" have the meanings stated in Title 8 of this article.

(b) *Purpose.* The purpose of this section [is] to:

(1) Reduce loss of life and property from flooding;

(2) Avoid the need for public expenditures for flood protection; and

(3) Protect or enhance the environmental quality of watersheds.

(c) *Development in floodplain prohibited; exceptions.* **The county may not permit development in a riverine floodplain** except for: (Emphasis added.)

(1) The establishment of property subdivision lines; and

(2) The installation of a pond, culvert, bridge, street, utility, or drainage facility that the county finds is not detrimental to floodplain management programs.

(d) *Base flood elevation.*

(1) Except as provided in paragraph (2) of this subsection, if the floodplain is shown on the flood insurance rate map, the county shall limit any increase in the existing base flood elevation to a maximum of 1 foot.

(2) The county may not allow encroachment in the floodway causing an increase in the existing base flood elevation.

**BCC § 32-8-101. DEFINITIONS.**

(a) *In general.* In this title and in any code or regulations adopted under the authority of this title, the following words have the meanings indicated.

(c) *Base flood.* "Base Flood" means the 100-year frequency flood event as indicated in the Flood Insurance Study, as amended, the elevation of which is used for regulatory purposes in the code.

(g) *Development.*

(1) "Development' means any man-made change to improved or unimproved real estate, including erection of buildings and other structures, dredging, fill, grading, paving, clearing, excavation, dumping, extraction, or storage of equipment or materials.

(2) "Development" includes subdivision of land.

(z) *Riverine floodplain.* "Riverine floodplain" means that land which is inundated by the storm water runoff created by a 100-year frequency flood and which is based on maximum

development of the watershed using the current zoning and based on the current standards approved by the Department of Public Works, but in no case less restrictive than the Federal Flood Insurance Study base flood.

**BCC §33-5-104. GRADING PLAN, SEDIMENT CONTROL PLAN AND FOREST PROTECTION AND ESTABLISHMENT PLAN – REQUIREMENTS AND EXEMPTIONS.**

(a) *Required.*

(1) Unless otherwise exempt, approved sediment control and grading plans are required for all grading operations.

(2) A grading permit or building permit may not be issued until:

(i) Subject to paragraph (3) of this subsection, a grading plan has been submitted to and approved by the Department;

(ii) Subject to paragraph (4) of this subsection, a sediment control plan has been submitted to and approved by the district; and

(iii) A forest protection and establishment plan, if applicable, and an accompanying cost estimate to implement the plan, has been approved by the Department, if required.

(3) Grading plans are not required for individual residential building lots that qualify for the use of a standard sediment control plan unless a preliminary inspection of the lot by the Department indicates field conditions that warrant that a grading plan is necessary to properly develop the lot.

(4) If the grading or construction is within the Chesapeake Bay Critical Area and relates to timber harvesting occurring within any 1 year and affecting 1 or more acres of forest or developed woodland, the sediment control plan may not be approved until a forest management plan is approved by the Department, the forestry programs of the State Department of Natural Resources, and the County Forest Conservancy District Board.

(b) *Exemptions.* The following activities are exempt from the requirements for grading and sediment control plans:

(1) Agricultural land management practices and construction of agricultural structures that occur outside of existing wetlands, watercourses, floodplains, buffers, and habitat protection areas, and which are subject to any agricultural land management practice determined by the Department to be the cause of an erosion or sediment condition detrimental to adjacent properties, public safety or any watercourse will be referred to the District for appropriate action under the District's land use rules and regulations adopted in accordance with §8-307 of the Agriculture Article of the Annotated Code of Maryland;

(2) Grading activities that do not include any watercourses, floodplains, wetland areas, buffers, habitat protection areas, or forest buffers, and that disturb less than 5,000 square feet of land area and less than 100 cubic yards of earth; and

(3) Grading activities that are subject exclusively to state approval and enforcement under state law and regulations, subject to the following conditions and requirements;

(i) Any grading activity subject to state approval and enforcement under state law and regulations determined by the Department to be the cause for an erosion or sediment condition detrimental to adjacent properties, public safety, or any watercourse shall be referred to the State Department of the Environment for corrective action;

(ii) Sediment control plans shall be prepared in accordance with and contain the information required by COMAR 26.17.01.07, and all state and local standards and specifications;

**BCC § 33-5-201. GRADING PERMIT REQUIRED; EXCEPTIONS.**

A grading permit is required for all land-disturbing activities not exempted under § 33-5-104 of this title with the exception of the following:

(2) Stockpiling of sand, stone and gravel at concrete, asphalt, and material processing plants or storage yards;"

**Baltimore County Zoning Regulations:**

"253.1. Uses permitted as of right. The uses listed in this section, only, shall be permitted as of right in M.L. Zones, subject to any conditions hereinafter prescribed.

A. The following industrial uses:

10. Concrete products manufacture, including manufacture of concrete blocks or cinder blocks.

B. The following transportation, storage or quasi-public uses or utilities:

2. Building materials storage or sales yard, general.

3. Construction equipment storage yards.

9. Fuel storage and sale of solid or gaseous fuels.

13. Railroads.

16. Storage, warehousing or wholesale distribution of any product whose sale (retail or wholesale) or final processing or production is permitted as of right as a principal use in M.L. Zones; public warehousing.

17. Transit centers, subject to Section 434.

18. Transit facilities.

20. Utility service center.

21. Utility storage yards."

BLANK PAGE

37142 SERVICE DATE AUGUST 18, 2006
DO

SURFACE TRANSPORTATION BOARD
DECISION
STB Docket No. AB-55 (Sub-No. 659X)
CSX TRANSPORTATION, INC. – ABANDONMENT
EXEMPTION – IN ALLEGANY COUNTY, MD

IN THE MATTER OF AN
OFFER OF FINANCIAL ASSISTANCE

Decided: August 17, 2006

CSX Transportation, Inc. (CSXT), filed a notice of exemption under 49 CFR 1152 Subpart F – Exempt Abandonments to abandon an 8.54-mile line of railroad on its Southern Region, Huntington Division East, Georges Creek Subdivision, between milepost BAI 27.0 near Morrison and milepost BAI 18.46 at the end of the track near Carlos, in Allegany County, MD. Notice of the exemption was served and published in the Federal Register on August 25, 2005 (70 FR 49974). Before the exemption became effective,[1] WMS, L.L.C. (WMS) late-filed a formal expression of intent to file an OFA to purchase the entire line and requested that the time period for submitting its OFA be tolled for 30 days. By decision served on September 23, 2005, WMS's late-filed notice of intent to file an OFA was accepted,[2] the time period to file an OFA was tolled until October 21, 2005, and the effective date of the exemption

1 The exemption was scheduled to become effective on September 24, 2005, unless stayed by the Board or a formal expression of intent to file an offer of financial assistance (OFA) was filed by September 2, 2005.

2 This filing had the effect of automatically staying the effective date of the exemption until October 4, 2005. *See* 49 CFR 1152.27(c)(2)(i).

was further postponed until October 31, 2005.

On October 21, 2005, WMS timely filed an OFA under 49 U.S.C. 10904 and 49 CFR 1152.27(c) to purchase the line for $360,610.[3] By decision served on October 26, 2005, WMS was found to be financially responsible and the effective date of the decision authorizing the abandonment was postponed to permit the OFA process to proceed. That decision set November 21, 2005, as the deadline for either party to request the Board to establish terms and conditions for the sale of the line if WMS and CSXT could not agree on the purchase price. On November 21, 2005, WMS advised the Board that WMS had agreed to accept the purchase price and terms offered by CSXT for the acquisition and operation of the line. **By decision served on December 14, 2005, WMS was authorized to acquire and operate the line**, and the notice of exemption was dismissed effective on the date the sale was consummated. (Emphasis added.)

On June 14, 2006, WMS filed a request to substitute for WMS its corporate affiliate James Riffin (Mr. Riffin) as the prospective purchaser of the line. On the same date, WMS and Mr. Riffin also filed a motion for protective order, pursuant to 49 CFR 1104.14, to allow WMS and Mr. Riffin to file under seal certain confidential documents and information in connection with this OFA proceeding. The motion for protective order was granted by decision served on June 27, 2006.

By decision served on July 6, 2006, Allegany County, Md (the County), was granted an extension of time until July 17, 2006, to file a reply to WMS's petition to substitute purchaser.

---

3 WMS also filed a motion for protective order under 49 CFR 1104.14 to file under seal certain confidential documents and information in connection with its OFA. The decision granting the motion for protective order was served on October 26, 2005.

The County submitted comments on July 17, 2006, stating that it supports the preservation of rail service on this line, but does not wish to see the line acquired by an individual or an entity that will not have sufficient capital to sustain the operations, to pursue a maintenance program that will allow safe and environmentally sound operations to continue, and to sustain any liabilities that may be incurred in the normal course of business.

Under 49 CFR 1152.27(i)(1), an offeror is permitted to substitute its corporate affiliate as the purchaser under an agreement, provided the Board has determined that either: (1) the original offeror has guaranteed the financial responsibility of its affiliate; or (2) the affiliate has demonstrated financial responsibility in its own right.

Mr. Riffin owns 98% of WMS. He has submitted financial information sufficient to determine that he is financially responsible in his own right, specifically: a certification of funds available from a savings bank and a personal financial statement. Furthermore, in a letter filed on July 12, 2006, Mr. Riffin stated that he wired to CSXT $300,000 on March 2, 2006, and an additional $425,000 on June 20, 2006, and that the sum of these two payments constituted the full purchase price of the line.[4] Because Mr. Riffin is a corporate affiliate of WMS, and has demonstrated himself to be financially responsible in his own right, the substitution of WMS [*sic*] for Mr. Riffin [*sic*] will be permitted.

This action will not significantly affect either the quality of the human environment or conservation of energy resources.

It is ordered:

---

4 In letters filed on July 10, and July 13, 2006, respectively, CSXT stated that it had consummated the sale and issued the deed to WMS.

1. WMS's motion is granted.
2. Mr. Riffin is substituted as the purchaser of the line effective on the service date of this decision.
3. This decision is effective on its service date.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams
Secretary

35599 SERVICE DATE – LATE RELEASE
EB MARCH 14, 2005

SURFACE TRANSPORTATION BOARD
DECISION
STB Finance Docket No. 34662
CSX TRANSPORTATION, INC. –
PETITION FOR DECLARATORY ORDER

Decided: March 14, 2005

In this proceeding, CSX Transportation, Inc. (CSXT) has petitioned the Board for an order declaring that the "Terrorism Prevention in Hazardous Materials Transportation Emergency Act of 2005" (the D.C. Act), which seeks to govern the transportation of hazardous materials moving by rail through the District of Columbia (District or D.C.), is federally preempted pursuant to 49 U.S.C. 10501 (b). On February 8, 2005, the Board issued a decision inviting the District and other interested persons to file comments on CSXT's petition by February 16, 2005. The District and the Sierra Club submitted replies opposing the petition. Comments in support of CSXT's petition were filed by the United States Department of Transportation (U.S. DOT), the Association of American Railroads, other railroad interests, shippers, including producers and users of hazardous materials, and Members of Congress. Subsequent to the filing of this petition, CSXT filed a petition in the United States District Court for the District of Columbia, seeking to have the D.C.Act declared invalid, and has sought a preliminary injunction from the court to enjoin enforcement of the D.C. Act. A briefing schedule in that case has been set, and a hearing is scheduled for March 23, 2005.

## BACKGROUND

### A. The D.C. Act

On February 1, 2005, the D.C. City council passed the D.C. Act, which the Mayor signed on February 15, 2005. The D.C.

Act would ban transportation of certain classes of hazardous commodities (including explosives, flammable gasses, poisonous gasses and other poisonous materials) within a 2.2 mile radius of the United States Capitol Building (the "Capitol Exclusion Zone") without a permit from the D.C. Department of Transportation (D.C. DOT). The D.C. Act also would ban the movement within that area of any rail car that is "capable of containing" such materials, thereby precluding the movement of empty hazardous materials rail cars within the Capitol Exclusion Zone without a permit from D.C. DOT. The D.C. Act provides for D.C. Dot to issue a permit for the movement of otherwise-banned commodities only if a carrier can demonstrate "that there is no practical alternative route" for the traffic.

B. CSXT's Petition

On February 7, 2005, CSXT filed a petition seeking a Board order declaring that the D.C. Act is preempted by section 10501(b). To prevent disruption to CSXT's rail service, CSXT requested that we grant expedited handling of this petition and act on its merits as soon as possible.

CSXT takes the position that the D.C. Act unreasonable burdens interstate commerce. CSXT states that enforcement of the D.C. Act could encourage other local jurisdictions to enact similar measures, and that the more extensive rerouting that would be needed to comply with the D.C. Act would merely transfer the risks associated with the transportation of hazardous materials to other cities and communities.

CSXT trains operating through the District contain both loaded cars containing hazardous materials and empty return movements of such cars. None of these movements originate or terminate within the District, and they are all interstate movements. CSXT notes that it must accept shipments of hazardous materials as part of its common carrier obligation to serve shippers upon request pursuant to 49 U.S.C. 11101(a).

The carrier further notes that a comprehensive scheme of federal regulation by U.S. DOT governs these movements. *See generally, CSX Transp. Inc. v. The Public Utilities Comm'n of Ohio,* 901 F.2d 497 (6th Cir. 1990); *Consolidated Rail Corp. v. ICC,* 646 F.2d 642, 648-49 (D.C. Cir. 1981). The regulations adopted by U.S. DOT's Research and Special Programs Administration (RSPA) pursuant to the Hazardous Materials Transportation Act (HMTA), 49 U.S.C. 5013 *et. seq.,* impose specific requirements for movement of hazardous materials. *See* 49 CFR Parts 171-180. The Federal Railroad Administration (FRA), has primary responsibility pursuant to the Federal Rail Safety Act (FRSA), 49 U.S.C. 20101 *et. seq.,* for matters involving safety of railroad operations, regulates railroad operations, including train speed, track and road bed conditions, signal systems, brake system standards, hours of service requirements for railroad employees, operating practices, and drug and alcohol testing for railroad employees. *See* 49 CRF Parts 200-268. FRA also has promulgated comprehensive track safety standards, which prescribe, among other things, maintenance and inspection requirements and maximum speeds for track, and can restrict, where necessary for safety, the movement of hazardous materials. 49 CFR Part 213.

The railroad states that, following the terrorist attacks of September 11, 2001, CSXT worked with FRA and the Transportation Security Administration (TSA)(now part of DHS) to develop a specific security plan for the transportation of hazardous materials that was reviewed and approved by both of those agencies. In 2004, TSA undertook a comprehensive vulnerability assessment of CSXT's rail routes through the District, and CSXT is in the process of implementing certain enhanced security measures recommended by TSA. Neither TSA nor any other federal agency has directed CSXT to reroute cars of hazardous commodities away from the District altogether.

CSXT has two lines that pass through the District: CSXT's north-south main line (the I-95 Route) that runs from

Jacksonville, FL, to Boston, MA, and its east-west main line (the East-West Route) from Washington, D.C. via Maryland and West Virginia, to Chicago, IL, and St. Louis, MO. In the Spring of 2004, CSXT, in consultation with federal officials, began voluntarily rerouting loaded cars carrying hazardous materials so that such cars no longer move over the I-95 Route through the District – the route that runs in close proximity to the Capitol. But the East-West Route, which is not near the Capitol, was not affected and continues to be used by CSXT for such traffic. Also, CSXT's voluntary rerouting does not apply to the movement of empty cars.

CSXT explains that the more extensive rerouting required by the D.C. Act would affect rail service around the country. According to CSXT, to avoid the District would in many cases add hundreds of miles and days of transit time to hazardous materials shipments. CSXT handles hazardous materials shipments in trains that also handle other traffic, and, accordingly, would have to delay trains at rail yards outside the District so that cars containing any of the commodities covered by the D.C. Act could be removed from the trains prior to entering the District. CSXT asserts that the additional switching operations and intermediate car handlings, and increases in the amount of dwell time spent in yards en route for cars handling hazardous materials, would add to congestion in rail yards already operating at or near capacity, could back up freight traffic on CSXT's main lines, and potentially could affect rail commuter and intercity passenger services operated over CSXT's lines in the metropolitan Washington area.

C. Replies in Opposition

In its February 16, 2005 reply, the District argues that CSXT's petition should be denied on the merits. The District maintains that its law was enacted to protect its citizens from a potential terrorist attack on a train (or truck) carrying hazardous materials, and therefore is an exercise of the District's police

powers that is not preempted by section 10501(b). It also claims that section 10501(b) does not preempt the D.C. Act because the D.C. Act does not constitute direct economic regulation of railroads. The District suggests that its action may be protected from challenge under the doctrine of sovereign immunity.

The Fiscal Impact Statement attached to the enrolled original of the D.C.Act provides that "[t]he primary impact of the legislation is to regulate the transport of hazardous materials by private organizations." Similarly, D.C. Council Members Patterson and Mendelson stated in a memorandum to D.C.Council members dated January 26, 2005, at 1, that the Act would "effectively prevent the through shipment of [hazardous materials] by rail or truck, thereby removing the risk and threat to our citizens."

Nevertheless, the District now maintains that the D.C.Act does not unreasonably burden interstate commerce. It contends that a provision of the D.C. Act that allows shipments to move if there is no practical alternative route and CSXT obtains a permit from D.C. DOT means that the Act is not a blanket prohibition of interstate commerce.

The District also argues that the Board does not have primary jurisdiction because FRA has primary responsibility for rail safety and DHS has primary jurisdiction over rail security. It contends that neither FRA nor DHS has adopted any regulations regarding the security concerns relating to the routing of hazardous materials movements, and therefore the District is free to adopt its own.

Sierra Club also opposes CSXT's petition. Sierra Club argues that the Board has no authority to address the D.C. Act because it does not constitute economic regulation. Sierra Club claims that CSXT's commerce clause arguments, as well as the carrier's preemption arguments related to the FRSA and the HMTA, should be addressed to the agencies that administer

those statutes or to a federal district court.

Both Sierra Club and the District suggest that, if the Board addresses CSXT's request on the merits, further evidentiary proceedings should be conducted first.

D. Replies in support

In comments supporting CSXT's petition, U.S. DOT presents its statutory analysis that interstate rail transportation is subject to overlapping regulatory oversight by three federal agencies – U.S. DOT, DHS, and the Board – and that, "[w]orking individually within their respective jurisdictions each has the complete authority to preempt non-Federal laws that undermine national rail uniformity" (comments at 5). U.S. DOT states that it has concluded that the D.C. Act is preempted by its safety regime under the FRSA and the HMTA, and that it interferes impermissibly with CSXT's routing decisions. Therefore, it urges the Board to find the D.C. Act to be preempted pursuant to section 10501(b), as well. U.S. DOT comments at 14.

The other commenters supporting CSXT's petition concur in CSXT's argument that the D.C. Act is preempted by section 10501(b). The commenters express concern that, if the District were successful in imposing such a restriction on interstate commerce, other municipalities would be encouraged to enact similar measures regarding when and where particular products could be carried, thereby disrupting commerce by rail throughout the country. The commenters recognize the public's concern about hazardous materials transportation, but argue that local measures to force rerouting of hazardous materials shipments by rail could foreclose transportation routes and operations that are optimal in terms of overall safety, security, and efficiency.

## DISCUSSION AND CONCLUSIONS

Although the Board does not have the power to invalidate the

D.C. Act, the Board has discretion to grant a request for a declaratory order. Under 5 U.S.C. 554(e) and 49 U.S.C. 721, we may issue a declaratory order to terminate a controversy or remove uncertainty in a case that relates to the subject matter jurisdiction of the Board. The Board has broad discretion to determine whether to issue a declaratory order. *See Intercity Transp. Co. v. United States*, 737 F.2d 103 (D.C. Cir. 1984); *Delegation of Authority – Declaratory Order Proceedings*, 5 I.C.C. 2d 675 (1989). In this case the Board will grant CSXT's petition and issue a declaratory order concluding that the D.C. Act is preempted by section 10501(b).

Before addressing the scope of section 10501(b), we will address certain preliminary matters. First, our decision here addresses only the preemptive effect of section 10501(b). The preemptive effect of other statutes is more properly addressed by the agencies that administer those statutes, and by the federal district court. Similarly, claims arising pursuant to the Constitution are also more properly addressed by the court.

Second, the District has suggested that it might require discovery in this proceeding to explore CSXT's factual allegations and that it should be permitted to present further evidence on the risks of terrorist attacks. In this connection, we do not make any factual findings in this decision. The issue presented here is a legal one, and the record before us provides the information we need to reach our conclusion. Therefore, neither discovery nor further evidentiary proceedings are necessary. *See Consolidated Rail Corp. – Declaratory Order Proceeding*, STB Docket No.34319, slip op. at 7 (STB served Oct. 10, 2003).

Third, the District suggests that relief is barred here by the doctrine of sovereign immunity. But sovereign immunity does not preclude the issuance of a decision analyzing controlling federal law. *See Dakota, Minn. & E.R.R. v. South Dakota*, 362 F.3d 512, 517 (8th Cir. 2004), *citing Verizon Md. Inc. v. Public*

*Serv. Comm'n*, 535 U.S. 635, 645 (2002); *Duke Energy Trading & Mktg. v. Davis*, 267 F.3d 1042, 1053-55 (9th Cir. 2001), *cert. denied*, 535 U.S. 1112 (2002).

Finally, the fact that this matter is also pending in the federal district court does not make Board issuance of this decision inappropriate, particularly if it might assist the court.

The Scope of the ICCTA Preemption

The Commerce Clause of the Constitution (Art. 1, sec. 8, cl. 3) gives Congress plenary authority to legislate with regard to activities that affect interstate commerce. *Gibbons v.* Ogden, 9 Wheat 1, 196 (1824). One of the areas in which Congress has done so is with respect to railroads, in the Interstate Commerce Act (ICA), now codified in pertinent part at 49 U.S.C. 701-727 (general provisions) and 10101-11908 (rail provisions). The ICA is "among the most pervasive and comprehensive of federal regulatory schemes." *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Col*, 450 U.S. 311, 318 (1981); *accord Deford v. Soo Line R.R.*, 867 F.2d 1080, 1088-91 (8th Cir. 1989) (**ICA so pervasively occupies the field of railroad governance that it completely preempts state law claims**). (Emphasis added.)

Although the ICA has long included a preemption clause, Congress further broadened the Act's express preemption in 1995. Section 10501(b) now expressly provides that "the jurisdiction of the Board over transportation by rail carriers" over any track that is part of the interstate rail network is "exclusive." And the term "transportation" is defined expansively in the ICA to embrace "a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of ... property ... by rail" as well as "services relating to that movement." 49 U.S.C. 10102(9). Section 10501(b) also expressly provides that "the remedies provided [in 49 U.S.C. 10101-11908] with respect to rates, classifications, rules (including car service, interchange,

and other operating rules), practices, routes, services, and facilities of such carriers" are "exclusive and preempt the remedies provided under Federal or State law." Thus, **section 10501(b) does not leave room for state and local regulation of activities related to rail transportation**, including routing matters. (Emphasis added.)

As the courts have observed, "[i]t is difficult to imagine a broader statement of Congress' intent to preempt state regulatory authority over railroad operations" than that contained in section 10501(b). *CSX Transp., Inc. v. Georgia Pub. Serv. Comm'n*, 944 F.Supp. 1573, 1581-84 (N.D. Ga. 1996) (*Georgia PSC*). Every court that has examined the statutory language has concluded that the preemptive effect of section 10501(b) is broad and sweeping, and that it blocks actions by states or localities that would impinge on the Board's jurisdiction or a railroad's ability to conduct its rail operations. *Friberg v. Kansas City S. Ry.*, 267 F.3d 439, 443 (5th Cir. 2001) (*Friberg)* (state statute restricting a train from blocking an intersection preempted, even though there is no Board regulation of that matter); *City of Auburn v. United States*, 154 F.3d 1025, 1029-31 (9th Cir. 1998) *(City of Auburn)* (**state and local environmental and land use regulation preempted**); *Wisconsin Cent. Ltd. v. City of Marshfield*, 160 F.Supp.2d 1009, 1014 (W.D. Wis. 2000) (*City of Marshfield*) (attempt to use a state's general eminent domain law to condemn an actively used railroad passing track preempted); *Dakota, Minn. & E.R.R. v. State of South Dakota*, 236 F.Supp.2d 989, 1005-08 (S. S.D. 2002), *aff'd on other grounds*, 362 F.3d 512 (8th Cir. 2004) (revisions to state's eminent domain law preempted where revisions added new burdensome qualifying requirements to the railroad eminent domain power that would have the effect of state "regulation" of railroads); *Georgia PSC*, 944 F.Supp. at 1573 (state regulation of a railroad's closing of its railroad agent locations preempted); *Soo Line R.R. v. City of Minneapolis*, 38 F.Supp.2d 1096 (D.Minn. 1998) *(Soo)* (local permitting regulation regarding the demolition of railroad buildings preempted); *Cedarapids, Inc.*

*v. Chicago, Cent. and Pac. R.R.*, 265 F.Supp.2d 1005, 1013-14 (N.D. Iowa 2003) (ICCTA preemption applies broadly to operation on both main line and auxiliary spur and industrial track); *Norfolk S.Ry. v. City of Austell*, No. 1:97-cv-1018-RLV, 1997 U.S. Dist. LEXIS 17236 (N.D. Ga. 1997) *(Austell)* (local zoning and land use regulations preempted); *Village of Ridgefield Park v. New York, Susquehanna & W.Ry.*, 750 A.2d 57 (N.J.2000) (*Ridgefield Park*) (complaints about rail operations under local nuisance law preempted). (Emphasis added.)

The cases cited above illustrate that Congress broadly divested states and localities of a regulatory role over rail transportation. By enacting section 10501(b), Congress foreclosed state or local power to determine how a railroad's traffic should be routed.

The District contends that section 10501(b) only preempts direct "economic" regulation of railroads, and not a state or local measure aimed at protecting its residents. However, **as the courts that have examined that provision have uniformly concluded, any notion that the statutory preemption in section 10501(b) is limited to direct state and local economic regulation is contrary to the broad language of the statute and unworkable in practice**. *See, e.g., Friberg*, 267 F.3d at 443; *City of Marshfield*, 160 F.Supp.2d at 1014 (section 10501(b) is broad enough to "expressly preempt more than just those laws specifically designed to regulate rail transportation"). In *City of Auburn* the court found that state and local environmental and land use permitting was preempted. 154 F.3d at 1030-31. As that court explained, if local authorities had the power to impose "environmental" permitting regulations on the railroad, such power would in fact amount to "economic" regulation if the carrier could thereby be prevented from constructing, acquiring, operating, abandoning, or discontinuing a line. Thus, the scope of section 10501(b) is broader than just direct economic regulation of railroads. (Emphasis added.)

The District suggests that the D.C. Act is not preempted because it does not totally bar the transportation of hazardous materials, but instead includes a process whereby a carrier can obtain a permit under certain circumstances and includes an exception in case of a temporary emergency elsewhere in the transportation system. **However, the courts have made clear that state or local permitting or preclearance requirements of any kind that would affect rail operations (including building permits, zoning ordinances, and environmental and land use permitting requirements) are preempted.** *See, e.g., City of Auburn,* 154 F.3d at 1029-31; *Soo; Austell; Ridgefield Park.* The D.C. Act's permitting regime is even more closely tied to actual movement of rail cars than those local permitting regimes that courts have already found to be preempted. Moreover, the District's view that the permitting provision demonstrates that the D.C. Act is not a burden on interstate commerce is at odds with the stated purpose in the enrolled bill as well as the statements of the D.C. Council members. [Emphasis added.]

Of course, there are limits on the scope of section 10501(b), but they are inapplicable to the D.C. Act. For example, section 10501(b) preemption does not extend to operations that are not part of the national rail network. Thus, in *Florida E. Coast R.R. v. City of W. Palm Beach,* 266 F.3d 1324 (11th Cir. 2001), a case cited by the District, the court found that preemption did not extend to an aggregate distribution plant that was located on railroad property but was neither owned nor operated by a railroad and thus was not part of "railroad transportation" as broadly defined in the ICA. 266 F.3d at 1336. But here, CSXT is a railroad providing transportation services over the subject lines, which are an important part of the interstate rail network.

Moreover, although a literal reading of section 10501(b) might suggest that it supersedes other federal law, the board and the courts have rejected such an interpretation as overbroad and unworkable. Instead, the Board and the courts have harmonized

section 10501(b) with federal statutes, including FRSA. *See, e.g., Tyrrell v. Norfolk S. Ry.* 248 F.3d 517 (6th Cir. 2001) (*Tyrrell*).

Also, as the ICCTA legislative history makes clear, states may exercise their police powers reserved by the Constitution to the extent the use of the police power does not unreasonably interfere with rail transportation. H.R. Rep. No. 104-311 at 95-96, *reprinted in* 1995 U.S.C.C.A.N. 793, 807-08. Thus, courts have found it permissible for a state to maintain traditional regulation of roads and bridges so long as no unreasonable burden is imposed on a railroad or to apply state and local requirements such as building and electrical codes as long as they do so without discrimination. But states or municipalities are not free to impose any requirements that they wish on a railroad in the name of police power. They cannot take an action that would have the effect of foreclosing or unduly restricting a railroad's ability to conduct its operations or otherwise unreasonably burden interstate commerce. *See, e.g., Friberg; City of Marshfield; Ridgefield Park.* Regulating when and where particular products can be carried by rail, as the D.C. Act purports to do, would not have merely incidental effects on rail operations, as the District and Sierra Club suggest, but would constitute direct regulation of a railroad's activities.

Finally, contrary to the District's and the Sierra Club's claims, section 10501(b) applies even though other federal agencies have primary responsibility over rail safety and national security matters. As the comments of U.S. DOT underscore, Congress has vested aspects of national rail oversight in three different federal agencies: U.S. DOT (with primary jurisdiction over rail safety matters), DHS (for national security matters), and the Board (with broad general jurisdiction over railroad activities conducted over the interstate railroad network). The jurisdiction and regulatory responsibilities of the three federal bodies necessarily overlap to some degree, and, where they do, the federal bodies coordinate and cooperate with each other as

appropriate. *See Boston & Maine Corp. v. STB,* 364 F.3d 318 (D.C. Cir. 2004); *Tyrrell.* But the reach of the Board's jurisdiction over rail transportation, and the preemption of state and local ability to regulate that transportation, is the same regardless of the commodity at issue. As U.S. DOT points out, the fact that the preemption contained in section 10501(b) overlaps with the preemptions contained in FRSA and HMTA does not lessen the preemptive effect of section 10501(b) or vice-versa. *Tyrrell,* 248 F.3d at 523 (both the Board and FRA have jurisdiction over railroad safety and the ICCTA and FRSA preemptions should each be taken into consideration to determine whether a particular action is federally preempted).

Section 10501(b) is intended to prevent a patchwork of local regulation from unreasonably interfering with interstate commerce. The D.C. Act would unreasonably interfere with interstate commerce, and if permitted to exist, would likely lead to further piecemeal attempts by other localities to regulate rail shipments. *See* "Pittsburgh Eyes Hazmat Ban," *Traffic World* at 29 (March 7, 2005) (reporting that Pittsburgh is considering adopting an ordinance similar to the D.C. Act should the D.C. Act be held lawful). However, in the Board's view well-settled precedent demonstrates that the D.C. Act is preempted by 49 U.S.C. 10501(b).

It is ordered:

1. CSXT's petition for a declaratory order is granted.
2. This decision is effective on its date of service.

By the Board, Chairman Nober, Vice Chairman Buttrey, and Commissioner Mulvey.

| | | |
|---|---|---|
| James Riffin<br>Appellant | * | IN THE COURT OF SPECIAL |
| vs. | | APPEALS OF MARYLAND |
| Department of the<br>Environment et.al. | * | Nos. 1593 & 1802 |
| | * | Sept. Term, 2004 |
| Appellees | | |

* * * * * * * * * *

**ORDER**

Upon consideration of Appellant's [Motion] to Reconsider the Court's unreported opinion filed on February 3, 2006 in the captioned appeals, it is this /5th/ day of April, 2006, by the Court of Special Appeals,

ORDERED that the Motion is denied.

For a panel of the Court

/s/ Chief Judge

CHIEF JUDGE

IN THE
COURT OF SPECIAL APPEALS OF MARYLAND
SEPTEMBER TERM, 2004
No. 1593 and No. 1802

---

JAMES RIFFIN, Appellant
v.
DEPARTMENT OF THE ENVIRONMENT, *et. al.*
Appellees

---

APPEAL FROM THE CIRCUIT COURT FOR BALTIMORE COUNTY

No. 1593 – Preliminary Injunction: THE HONORABLE JOHN O. HENNEGAN PRESIDING

No. 1593 – Permanent Injunction: THE HONORABLE VICKI BALLOU-WATTS PRESIDING

No. 1802 – Injunctive Order: THE HONORABLE ROBERT E. CADIGAN PRESIDING

---

# APPELLANT'S MOTION TO RECONSIDER

James Riffin, *pro se,* Appellant
1941 Greenspring Drive
Timonium, MD 21093
(443) 414-6210

1. Now comes your Appellant, James Riffin, *pro se*, who herewith, pursuant to Maryland Rule 8-605, files this Motion to Reconsider, and for reasons states:

2. The Court, in an unreported decision, filed on February 3, 2006, affirmed the judgment of the circuit court for Baltimore County in Case No. 1593; and dismissed as moot, the appeal of the judgment of the circuit court for Baltimore County in Case No. 1802.

**I. MUST A FACILITY BE OWNED BY A RAIL CARRIER, AND MUST THAT RAIL CARRIER HAVE AUTHORITY FROM THE STB TO OPERATE A LINE OF RAILROAD, FOR THAT FACILITY TO BE SUBJECT TO THE EXCLUSIVE JURISDICTION OF THE STB?**

3. The Court's decision regarding whether the Surface Transportation Board ("Board" or "STB") has exclusive jurisdiction over a railroad facility, was premised on the Court's incorrect reading of the applicable federal statutes: 49 U.S.C. §§ 10102 (9) (A) and (B); and 10501(b).

4. On page 13 of the Court's Opinion ("Opinion"), the Court stated:

> "On April 20, 2004, six days *before* the circuit court's hearing in the Greenspring Drive case (No. 1802), the STB revoked appellant's second NOE, thereby eliminating any claim or authority that he might assert to operate a railroad and/or subject his operations to the STB's exclusive jurisdiction. Because his third NOE was not filed until April 28, 2004, appellant was precluded from claiming any authority under it before the circuit court on April 26, 2004. Even assuming, as appellant argues, that the third NOE automatically became effective seven days after it was filed, appellant did not receive authority from the STB until *after*

the circuit court issued its May 3, 2004 order." (Emphasis in original.)

5. On page 14 of the Court's Opinion, the Court stated:

"... appellant had no authority to either operate a railroad or invoke the STB's exclusive jurisdiction. We hold that, because appellant's appeal of the Greenspring Drive case (No. 1802) is premised entirely upon his contention that he is "a federally licensed Class III rail carrier," and presents no other issues, the case is moot."

In the Cockeysville case (No. 1593), we hold that the STB's February 23, 2005 revocation of appellant's third NOE renders any preemption issues, or arguments by appellant that his conduct is subject to the exclusive jurisdiction of the STB, moot."

6. On page 65 of Appellant's Brief, in ¶ 146, Riffin pointed out that the 49 U.S.C. § 10102 (9) definition of 'transportation' included "*equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use; and (B) services related to that movement ...*" In ¶ 147 Riffin stated:

"147. Riffin's two railroad facilities are used to store property and equipment which relates to the movement of passengers or property by rail. This property and equipment may be used by Riffin's railroad, **or may be used by other rail carriers.** Consequently, both sites are railroad facilities. As such, they are subject to the exclusive jurisdiction of the STB." (Emphasis added.)

7. Riffin's appeal of Case No. 1802 **was not** premised entirely upon his contention that Riffin is a federally licensed

Class III rail carrier. It was premised on the fact that the 1941 Greenspring Drive facility was used to store "property and equipment related to the movement of passengers or property, or both, by rail, regardless of ownership ..." and upon the fact that "services related to that movement" were performed by the other tenants at that facility.

8. In *Chevron, U.S.A., Inc. v. Natural Resources Defense,* 467 U.S. 837 at 842-844, 104 S.Ct. 2778 at 2781-2783, 81 L.Ed. 2d 694 (1984), the Supreme Court stated:

> "When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the **court**, as well as the agency, **must** give effect to the unambiguously expressed intent of Congress." (Emphasis added.)

9. In this case, Congress has spoken to the precise question at issue: 49 U.S.C. §10501 (b) states the jurisdiction of the Board over "(2) the construction, acquisition, operation ... of ... facilities ... is exclusive. Except as otherwise provided in this part, the remedies provided under this part **with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law."** (Emphasis added.) The definition for the word 'transportation,' found at 49 U.S.C. §10102 (9), states:

> (9) "transportation" includes – (A) a ... warehouse ... yard, property, facility, or equipment of any kind related to the movement of passengers or property, or both, by rail, **regardless of ownership or an agreement concerning use**; and (B) services related to that movement ..." (Emphasis added.)

10. The statute clearly states the Board has exclusive jurisdiction with respect to the regulation of rail transportation. The definition of the term 'transportation' clearly states 'transportation' includes a warehouse, yard, property, facility or equipment of any kind, **regardless of ownership**. And the statute clearly states that if that warehouse, yard, property, facility or equipment of any kind, or if services performed at that facility, relates to the movement of passengers or property by rail, then the regulation of that warehouse, yard, property, or facility, is within the exclusive province of the Board. The statutes **do not** state the warehouse, yard, property, facility or equipment has to be owned by a railroad which has Board authority to operate a line of railroad. Quite the contrary. The statute clearly states that who owns the property or equipment is irrelevant. What does matter, is what the property is used for. For example, in *Florida East Coast Ry. v. City of West Palm Beach,* 266 F.3d 1324 (11th Cir. 2001), the railroad owned property that it had leased to a non-rail carrier. The activities at the site did not relate to the movement of passengers or property by rail. (The site was used to distribute aggregates via trucks.) On page 1336 of its opinion, the 11th Circuit court said:

> "Given this statutory history, we reject FEC's reading of the phrase "regardless of ownership or agreement concerning use" found in the ICCTA's definition of "transportation." Congress employed this language specifically to grant the ICC jurisdiction over those facilities that, while not owned by the railroad companies, were nevertheless used in interstate commerce for the benefit of either the shipping public or the railroad companies themselves."

> "In this case, Rinker's use of the property at the 15th Street yard and the activities there performed by Rinker ... provide no valuable service to FEC;"

Since the intent of Congress is clear, this Court "**must** give effect to the unambiguously expressed intent of Congress," to wit: Since both of Riffin's facilities have material and equipment which relates to the movement of passengers or property by rail and since services which relate to the movement of passengers or property by rail, are performed at both facilities, both facilities are subject to the exclusive jurisdiction of the Board.

11. The Record in both cases clearly reflects that both facilities are used to store equipment that relates to the movement of passengers or property by rail (railroad ties, rails, track maintenance equipment, etc.), and that the tenants at the 1941 Greenspring Drive facility perform services which relate to the movement of passengers or property by rail (prepare invoices, bills of lading, schedules, manifests, signage, etc.).

12. For the above reasons, Riffin would argue that whether Riffin has authority from the Board to operate a line of railroad, is irrelevant.

## II. RIFFIN'S AUTHORITY TO OPERATE A LINE OF RAILROAD

13. If it is ultimately held that a facility must be owned by an entity that has Board authority to operate a line of railroad, before that facility falls under the exclusive jurisdiction of the Board, then both of the facilities which are the subject of this appeal, meet that criteria.

A. From March 25, 2004 until April 20, 2004, Riffin had Board authority to operate two lines of railroad: 2.9 miles in Baltimore County, MD and 20.9 miles in York County, PA.

B. From May 5, 2004 until February 23, 2005, Riffin had Board authority to operate 19 miles of railroad line in York County, PA.

C. On February 1, 2005, Riffin leased his facilities to another railroad that has Board authority to operate a line of railroad. See **Exhibit C**, attached hereto, which is an Affidavit executed by Riffin on March 18, 2005.

D. On December 13, 2005, the Board granted an entity owned (98% control), operated and managed by Riffin (WMS L.L.C.), authority to acquire and operate 8.54 miles of railroad line in Allegany County, Maryland. See **Exhibit A**, attached hereto: STB Docket No. AB-55 (Sub-No. 659X), decided December 13, 2005. (CSXT agreed to sell this railroad line to Riffin. On March 2, 2006, Riffin wired funds to CSXT to purchase the line with. See **Exhibit B**, attached hereto. In September, 2005, Riffin informed counsel for Appellee that Riffin had an interest in purchasing this line. Riffin expects to begin hauling coal over this line in June of 2006.)

E. On January 24, 2006, Riffin filed a Notice of Intent to File an Offer of Financial Assistance to purchase from Norfolk Southern, the freight operating rights and easements associated with the Cockeysville Line, which runs from North Avenue, Baltimore City, to Cockeysville, Maryland. See STB Docket No. AB 290 (Sub-No. 237X). This line is immediately adjacent to Riffin's 1941 Greenspring Drive facility (Case No. 1802), and is immediately adjacent to Riffin's 10919 York Road facility (Case No. 1593). On April 3, 2006, the Board is scheduled to render a decision regarding Norfolk Southern's Petition to abandon its freight operating rights over this line. The Board's regulations stipulate Riffin can file his actual Offer of Financial Assistance to purchase the line immediately after the Board renders its decision. If Riffin agrees to pay the "net constitutional value" ascribed to the line, then Riffin will have the absolute right to purchase the line. By the time this case (Appeal Nos. 1593 and 1802) is resolved, Riffin expects to be operating trains on this line. The two facilities that are the subject of this appeal, are support facilities for Riffin's Allegany County rail line, for

Riffin's Cockeysville rail line, for other rail lines Riffin expects to purchase, and for other rail lines who desire to utilize Riffin's track maintenance equipment, or who desire to store or maintain their railroad equipment at Riffin's sites.

14. The Board's February 23, 2005 decision revoking Riffin's authority to operate 19 miles of rail line in York County, PA, and the Board's December 13, 2005 decision granting Riffin's WMS L.L.C. authority to operate 8.54 miles of rail line in Allegany County, MD, were rendered subsequent to the filing of the appeals presently before this Court, but prior to the filing of this Court's decision. Since both Board decisions are public documents, it would be appropriate for this Court to take judicial notice of both of these Board decisions. It would not be appropriate to take judicial notice of the Board's February 23, 2005 decision, revoking Riffin's third Notice of Exemption, without also taking judicial notice of the Board's December 13, 2005 decision, granting Riffin authority to operate a line of railroad in Allegany County, Maryland.

## III. THIS COURT DOES NOT HAVE JURISDICTION TO RENDER A DECISION BASED ON ITS INTERPRETATION OF 49 U.S.C. §10501 (b) OR §10102.

15. On p. 23 of Appellant's Brief, Riffin quoted the following from *ASARCO Inc. v. Kadish,* 490 U.S. 605, 617, 109 S.Ct. 2037, 2045, 104 L.Ed.2d 696 (1989):

"Although the state courts are not bound to adhere to federal standing requirements, they possess the authority, **absent a provision for exclusive federal jurisdiction,** to render binding judicial decisions that rest on their own interpretations of federal law."

16. This Court rendered a decision based on its interpretation of 49 U.S.C. §10501(b) and §10102, to wit: This Court held

that if a facility was not owned by an entity that had Board authority to operate a line of railroad, then that facility was not subject to the exclusive jurisdiction of the Board, even though that facility was used to store equipment related to the movement of passengers or property by rail, and even though the tenants at that facility provided services that related to the movement of passengers or property by rail. This Court's decision that the issue of whether either of Riffin's facilities was subject to the exclusive jurisdiction of the Board, was rendered moot when the Board revoked Riffin's second Notice of Exemption ("NOE"), was based on its interpretation of 49 U.S.C. §§ 10501(b) and 10102.

17. This Court chose not to address this issue of preemption. Riffin would argue, this issue was not rendered moot when the Board revoked Riffin's second NOE, for the statute does not restrict the Board's jurisdiction only to facilities owned by rail carriers with Board authority to operate a line of railroad. Before this Court could render a decision that the issue of federal preemption was rendered moot, this Court had to interpret the applicable federal law. As noted above, the Supreme Court has stated a State court does not have authority to interpret a federal statute when that federal statute contains a provision for exclusive federal jurisdiction. 49 U.S.C. §10501(b) is a federal statute which contains a provision for exclusive federal preemption. Consequently, this Court did not have authority to interpret this statute, then to conclude that if the owner of a facility that stores equipment related to the movement of passengers or property by rail, does not have Board to operate a line of railroad, then that facility is not subject to the Board's exclusive jurisdiction. Furthermore, since Riffin has now reacquired Board authority to operate a line of railroad, this issue again attains prominence, and should be addressed.

## IV. MATERIAL FACTS ISSUES

18. The Court held that resolution of the following facts,

while in dispute, "will do little to determine whether appellant, without ever having applied for or obtained the required permits, cleared, filled, and graded approximately 9,000 square feet of land within the 100-year floodplain." Opinion at 17. Whether Riffin disturbed 9,000 square feet of land within the 100-year floodplain is not in dispute. What is in dispute, is whether Appellees' regulations have been preempted, and if not, whether Riffin's activities violated the statutes cited by Appellees, and if so, what penalties Riffin would be subject to.

**Disputed Facts.**

"E. Does the scope of [appellant's] present construction plans exceed one acre?

F. Did [appellant] install sediment controls prior to his land disturbing activities at his Cockeysville facility?

G. On what date did [appellant] first "change the natural ground level" at his Cockeysville facility?

J. What was the cost to re-install sediment controls and to restore the Cockeysville site to a stable condition?"

19. Riffin filed in the circuit court a Supplement to Riffin's Answer to Plaintiffs' Cross Motion for Summary Judgment ("Supplement"), wherein Riffin argued in detail why the above four facts were material. A copy of that Supplement is attached hereto, as **Exhibit D,** and is incorporated by reference herein. Below is a summary of the more extensive arguments that appear in the Supplement.

20. "E. Does the scope of [appellant's] present construction plans exceed one acre?"

Appellant was cited for violating §4-413 of the Environment Article, which prohibits introducing soil into

waters of the State without first obtaining a §9-323 permit. Appellee sought a civil penalty in the amount of $125,000 for this alleged violation. See Count 5 of Appellees' Complaint, p. 10 of Appellees' Memorandum in Support of Cross-Motion for Summary Judgment ("Cross-Motion"), and ¶ 10, Permanent Injunction, E-67. Judge Ballou-Watts wrote on the Permanent Injunction: "Civil penalties are denied at this time." While Judge Ballou-Watts denied this civil penalty, she left the door open to impose the penalty at a later time, if she so desired. Thus, Riffin is still subject to this very substantial penalty. Whether Riffin disturbed less than one acre is very material to this penalty, for if Riffin disturbed less than one acre, then Riffin would not be subject to this penalty. (If one disturbs less than one acre, then that activity is permitted under MDE's General Permit for Construction Activity.) See p. 4 of the attached Supplement.

21. "F. Did [appellant] install sediment controls prior to his land disturbing activities at his Cockeysville facility?"

"G. On what date did [appellant] first "change the natural ground level" at his Cockeysville facility?"

"J. What was the cost to re-install sediment controls and to restore the Cockeysville site to a stable condition?"

Appellant was cited for violating §4-103 of the Environment Article and Article 33, Title 5 of the Baltimore County Code, for Riffin's alleged failure to install and maintain effective sediment controls. Appellee sought a civil penalty in the amount of $160,000 for this alleged violation. See Count 3 of Appellees' Complaint, p. 9 of Appellees' Cross-Motion, and ¶ 12, Permanent Injunction, E-68. Judge Ballou-Watts wrote on the Permanent Injunction: "Civil penalties are denied at this time." While Judge Ballou-Watts denied this civil penalty, she left the door open to impose the penalty at a later time, if she so desired. Thus, Riffin is still subject to this very substantial penalty. The date that Riffin installed his sediment controls, and the date that Riffin first changed the natural ground level at his site, are material facts, for if Riffin installed his sediment

controls prior to his land disturbing activities, then Riffin would not be subject to this penalty. The cost to re-install sediment controls and to restore the site to a stable condition is very material, for the penalty is based on this cost. (The penalty is double this cost.) If this cost is a nominal amount, rather than the $80,000 alleged by the Appellees', then the penalty would be a nominal amount, rather than the $160,000 sought by the Appellees.

22. This Court held that the following facts, although material, were not in dispute before the circuit court:

"H. Did [appellant] construct an obstruction in, or change the cross-section of, a "stream or body of water?"

"I. Did [appellant] place soil in a position where it was "likely to be washed into waters of the State by runoff?"

23. This Court cited Appellant's stipulation to Appellees' counsel's proffer, which included the following statement:

"[Appellant] also graded the floodplain flat in preparation for construction of a railroad. All of this grading had the affect of changing the cross section of the 100 year floodplain at Beaver Dam Run."

24. **Material fact "H."** As stated previously, whether Riffin disturbed earth in the 100-year floodplain is not in dispute. What is in dispute, is whether Riffin changed the cross-section of a **"stream or body of water."** As Riffin extensively argued in his Brief, a stream or body of water **does not** include the floodplain associated with that stream or body of water. And while the phrase "waters of the State" does include a stream's floodplain, **that phrase does not appear** in §5-503 of the Environment Article, which reads as follows:

"A person shall obtain a permit ... to construct ... any

... waterway obstruction ... or ... to change in whole or part the course, current, or cross section of any **stream or body of water** within the State." (Emphasis added.)

25. Count one of Appellees' Complaint charged Riffin with violating §5-503 of the Environment Article, alleging construction within a floodplain constituted a violation of §5-503. For this statute, a stream's floodplain is irrelevant. The statute addresses construction **within a stream, NOT construction in a stream's floodplain.**

26. **Material fact "I."** This fact is material, for it is the basis for Count 5 of Appellees' Complaint, and is the basis for the proposed $125,000 fine contained in ¶ 10 of the Permanent Injunction (which fine the circuit court may still impose). The only rationale offered by this Court for its position that material fact "I" was not in dispute, was that Riffin had stipulated that he had placed soil in a floodplain. Riffin would argue that there is a significant difference between **deliberately** placing soil in a floodplain, and placing soil in a position where it was "likely to be **washed** into waters of the State **by runoff**." The purpose of §4-413 of the Environment Article is to prevent sediment from being deposited in a **stream**. (Depositing sediment in a stream can have a serious deleterious effect on a stream.) Deliberately placing soil in a floodplain is a controlled event, and if done properly, will not pollute an adjacent stream with sediment. Placing loose soil anyplace, whether in, or not in, a floodplain, without appropriate sediment controls, has the potential to cause sediment to be deposited in a stream. The focus of the statute, is to prevent **uncontrolled** deposition of soil in a stream, or more precisely, the washing of soil into a stream by runoff from a rain event. The statute's phraseology incorporates an undefined probability standard: "is likely." Stated in more mathematical terms, the statute states that if there is at least a 51% probability that runoff from a rain event would cause disturbed soil to be washed into a stream or into a floodplain, then the activity that caused the soil to be disturbed, would contravene the prohibition

contained in the statute. Probabilities address future events that have not occurred. If the future event actually occurs, and nothing dire happens, then the probability of that dire event happening, becomes zero.

27. In the instant case, many rainfall events have occurred following Riffin's placement of soil in the floodplain. Two of these rainfall events were greater-than 100-year rainfall events. (Tropical storm Ivan and another unnamed storm event subsequent to Ivan.) There is no evidence that **any** of the soil Riffin placed in the floodplain was **washed** into either the floodplain or stream **by runoff.** Since none of the runoff from any of these rainfall events washed any of Riffin's soil into the floodplain or stream, the probability that runoff would wash Riffin's soil into the floodplain or stream became zero, or 'highly unlikely,' rather than 'likely.'

## STATUTE INTERPRETATION

28. The statutes in question are penal statutes. §4-417 (b) of the Environment Article [Injunction ¶ 10] provides for imprisonment not exceeding one year. § 33-5-302 Baltimore County Code [Injunction ¶ 12] provides for imprisonment not exceeding 90 days. Penal statutes are to be strictly construed in favor of the defendant. *State v. Canova,* 278 Md. 483, 365 A.2d 988.

29. "When a court interprets statutory provisions, it is necessary to first analyze the language of the statute itself. *Landreth Timber Co. v. Landreth,* 471 U.S. 681, 685, 105 S.Ct. 2297, 2301, 85 L.Ed.2d 692 (1985); *In re Maxway Corp.*, 27 F.3d 980, 982 (4th Cir. 1994). " 'If the statutory language is unambiguous, in the absence of a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive. *Russello v. United States,* 464 U.S. 16, 20, 104 S.Ct. 296, 299, 78 L.Ed.2d 17 (1983) (quoting *United States v. Turkette,* 452 U.S. 576, 580, 101 S.Ct. 2524, 2527, 69 L.Ed.2d 246 (1981)), (quoting *Consumer Product Safety Comm'n v.*

*GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051, 2056, 64 L.Ed.2d 766 (1980)) (internal quotes omitted). In seeking to understand a statutory scheme, the court will start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used. *Richards v. United States*, 369 U.S. 1, 9, 82 S.Ct. 585, 590-91, 7 L.Ed.2d 492 (1962). Thus, "unambiguous statutory text prevails over arguments based on statutory history and purpose." *Vaughn v. Sullivan*, 83 F.3d 907, 910 (7th Cir. 1996)." *Turk v. Buffets, Inc.*, 940 F.Supp. 1255 (N.D. Ill. 1996).

30. To prevail in this case, the Appellees must show Appellant was not in compliance with the applicable statutes. Those statutes must be strictly construed in favor of Appellant. The six facts discussed above, are material, for they are at the heart of Appellees' allegations. If the resolution of these six facts does not support Appellees' arguments, then Appellees' allegations fail, as does the basis for the permanent injunction issued by the circuit court.

**STREAM RELATED ISSUES**

31. Appellant raised a number of stream related issues. This Court's opinion did not address any of these issues. If it is ultimately determined that Maryland's courts do in fact have jurisdiction over Riffin's railroad facilities, and that Riffin's facilities are subject to Maryland's environmental laws, then the next set of issues that need to be addressed, is whether Maryland's common law regarding riparian rights have been abrogated by Maryland's Environment Article, and if not, whether Maryland's common law permits Riffin to repel unlawful waters by filling in his property, and by erecting a levee on his Cockeysville property. These issues were extensively discussed in Appellant's Brief, beginning on page 72. What follows is a very brief review of that discussion.

32. "It has been said that statutes are not presumed to make any alterations in the common law further than is expressly

declared, and that a statute, made in the affirmative without any negative expressed or implied, does not take away the common law. The rules of the common law are not to be changed by doubtful implication, nor overturned except by clear and unambiguous language. In order to hold that a statute has abrogated common law rights existing at the date of its enactment, it must clearly appear that they are repugnant to the act, or the part thereof invoked, that their survival would in effect deprive it of its efficacy and render its provisions nugatory." *Lutz v. State*, 167 Md. 12, 15, 172 A. 354, 356 (1934) (quoting 25 R.C.L. 1054). Quoted in *Robinson v. State*, 353 Md. 683, 693, 728 A.2d 698, 702 (1999). [See ¶ 169, Appellant's Brief.]

33. As Appellant stated in ¶ 170 of Appellant's Brief, **none** of the statutes relied upon by Plaintiffs have express language which state they abrogate, supercede, or modify the common law or Maryland's case law regarding riparian rights. §5-512 of the Environment Article specifically states: **(a) *In general.* – The provisions of this subtitle do not amend or repeal: (1) Any law relating ... to water ... . The provisions of this subtitle do not impair any riparian or other vested right, ... .**" [See ¶ 214, Appellant's Brief.] §9-303 of the Environment Article states: "This subtitle [Subtitle 3. Water Pollution control.] **does not take away the right of any person, as a riparian owner or otherwise, in equity, at common law, or under statutory law to suppress a nuisance or abate pollution.**" [See ¶217, Appellant's Brief.] The unlawful waters that periodically inundate Riffin's Cockeysville site, constitute a 'nuisance.' Maryland's Court of Appeals has consistently stated that a property owner may add fill to his land, or may erect barriers, or both, to ward off unlawful waters. [See ¶¶ 173 to 181 of Appellant's Brief.]

**OTHER ISSUES NOT ADDRESSED BY THE COURT**

34. Appellant raised a number of other issues, which this Court's opinion did not address, to wit: Plaintiffs' Failure to State a Cause of Action and / or Lack of Standing; a number of

Maryland law questions; and whether §33-5-210 of the Baltimore County Code, specifically grants a property owner the right to stockpile sand, stone and gravel, without first obtaining a permit. The Baltimore County Code issue is particularly significant, since ¶ 8 of the Permanent Injunction enjoins Riffin from objecting to MDE employees or agents, or Baltimore County employees or agents, coming onto Riffin's property for the purpose of removing all stockpiled stone and gravel. This provision of the permanent injunction was premised on the supposition that Riffin did not first obtain a permit before stockpiling this stone and gravel on his property. If a permit is not required, then the underpinning for this portion of the permanent injunction fails.

WHEREFORE, for the reasons cited above, Appellant would respectfully ask that this Court Reconsider its February 3, 2006 decision in this case, and thereafter, reverse the judgment of the circuit court, and would pray for such other relief as would be appropriate.

Respectfully submitted,
/s/ James Riffin

James Riffin, Appellant

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY, that on this / 3rd / day of March, 2006, a copy of the foregoing Motion for Reconsideration was hand delivered to the Baltimore County Office of Law, 2d floor, Old Court House Building, Towson, Maryland, and one copy was mailed to Adam D. Snyder, Assistant Attorney General, Maryland Department of the Environment, 1800 Washington Boulevard, Suite 6048, Baltimore, Maryland 21230.

/s/ James Riffin
James Riffin, Appellant

## SEQUENCE OF EVENTS

| Date | Period Petitioner was Licensed rail carrier | Event |
|---|---|---|
| 2003 | | Railroad equipment / concrete ties / ballast delivered to Cockeysville site. |
| 02/2004 | | Grading of Cockeysville RR facility begins |
| 03/08/04 | | Petitioner filed MD NOE |
| | 03/15/04 | Petitioner became licensed rail carrier |
| | 04/20/04 | NOE revoked by STB; controversial |
| 04/26/04 | | Greenspring motion hearing; injunction issued |
| 04/28/04 | | Petitioner filed PA NOE |
| | 05/05/04 | Petitioner became licensed rail carrier |
| 08/25/04 | | Maryland filed Cockeysville complaint |
| 09/02/04 | | Cases removed to U.S.D.C. |
| 09/08/04 | | Cases remanded back to State |
| 09/14/04 | | USDC Injunction filed against Maryland attys |
| 09/16/04 | | USDC dismissed injunction |
| 09/23/04 | | Appeal filed to 4th circuit |
| 11/18/04 | | Cockeysville summary judgment motion hearing |
| 11/19/04 | | Cockeysville injunction issued. |
| 02/14/05 | | 4th circuit aff'd USDC |
| | 02/23/05 | Pa NOE revoked; controversial |
| 10/21/05 | | Frostburg OFA filed. |
| | 12/14/05 | Petitoner became licensed rail carrier |
| 02/03/06 | | Court of Special Appeals decision issued. |

| Date | Period Petitioner was Licensed rail carrier | Event |
|---|---|---|
| 03/03/06 | | Motion to reconsider filed. |
| 04/05/06 | | Motion to reconsider denied. |
| 04/20/06 | | *Writ Certiorari* filed in Court of Appeals |
| 06/16/06 | | *Writ Certiorari* denied by Court of Appeals |
| 09/14/06 | | *Writ Certiorari* filed USSC |

**SUPREME COURT CASES HOLDING THE ICA PREEMPTS STATE LAW**

The following cases were quoted in *Chicago & N.W. Transp. v. Kalo Brick & Tile*, 450 U.S. 311, 318-321, 101 S.Ct. 1124, 1130-1132, 67 L.Ed.2d 258 (1981) ["*Kalo*"] [which held the Interstate Commerce Act ("ICA") precludes a shipper from pressing a state-court action for damages against a regulated carrier when the Interstate Commerce Commission ("ICC"), in approving the carrier's application for abandonment, reaches the merits of the matters the shipper seeks to raise in state court].

*Texas & Pacific R. Co.v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446, 27 S.Ct. 350, 357, 51 L.Ed.553 (1907): "Supreme Court struck down a State's common-law cause of action to challenge as unreasonable a rail common carrier's rates because rate regulation was within the exclusive jurisdiction of the Comission, and a state-court action "would be absolutely inconsistent with the provisions of the act." "

*Transit Comm'n v. United States*, 289 U.S. 121, 129, 53 S.Ct. 536, 538, 77 L.Ed. 1075 (1933): Held "that the Interstate Commerce Commission's statutory authority to regulate extensions of service was exclusive and therefore stripped a similar state commission of all power to act in the same area."

*Chicago v. Atchison, T.& S.F.R.Co.*, 357 U.S. 77, 87, 78 S.Ct. 1063, 1069, 2 L.E.2d 1174 (1958). Court held: "that a city ordinance requiring a license from a municipal authority before a railroad could transfer passengers, an activity also subject to regulation under the ICA, was facially invalid as applied to an interstate carrier. "[I]t would be inconsistent with [federal] policy," we observed, "if local authorities retained the power to decide" whether the carriers could do what the Act authorized them to do.

*Missouri Pacific R.Co. v. Stroud*, 267 U.S. 404, 408, 45 S.Ct. 243, 245, 69 L.Ed. 683 (1925). "[T]here can be no divided authority over interstate commerce, and ... the acts of Congress on that subject are supreme and exclusive."

*Alabama Public Service Comm'n v. Southern R.Co.*, 341 U.S. 341, 346, n.7, 71 S.Ct. 762, 766 n.7, 95 L.Ed. 1002 (1951). The authority of the Commission to regulate abandonments is exclusive.

*Colorado v. United States*, 271 U.S. 153, 164-166, 46 S.Ct. 452, 455, 70 L.Ed. 878 (1926). Supreme Court's first interpretation of §1 (18) ICA. Held the scope of §1(18) is broad and that the authority of the Commission to regulate abandonments is exclusive.

*Palmer v. Massachusetts*, 308 U.S. 79, 85, 60 S.Ct. 34, 37, 84 L.Ed. 93 (1939). The Commission's authority over abandonments is also plenary. So broad is this power that it extends even to approval of abandonment of purely local lines operated by regulated carriers when, in the Commission's judgment, "the over-riding interests of interstate commerce requir[e] it."

*Purcell v. United States*, 315 U.S. 381, 384, 62 S.Ct. 709, 710, 86 L.Ed. 910 (1942). The conclusions of the Commission are entitled to considerable deference.